Supreme Court of the United States

OCTOBER TERM, 1969

No. 1486

HAROLD WHITELEY,

Petitioner,

—vs—

THE WARDEN OF THE WYOMING STATE PENITENTIARY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Nov. 21, 1967—Petition for writ of habeas corpus, with application for leave to proceed in forma pauperis, filed.

Nov. 21, 1967—Order granting leave to proceed in forma pauperis, filed.

Nov. 21, 1967—Order to show cause giving respondent 20 days to show cause why writ of habeas corpus should not be granted, filed.

Dec. 7, 1967—Motion of respondent to dismiss, filed, asserting that petitioner failed to exhaust his state remedies as required by 28 U.S.C. Section 2254.

Feb. 13, 1968—Petitioner's Response to Respondent's Motion to Dismiss, filed.

Feb. 16, 1968—Hearing on Respondent's Motion to Dismiss. Court announces motion is denied, Respondent given 20 days to answer, order to be submitted by Respondent.

Feb. 28, 1968—Order denying respondent's motion to dismiss and giving respondent 20 days to answer application for writ of habeas corpus, filed.

March 7, 1968—Answer of respondent to petition for writ of habeas corpus, filed.

July 22, 1968—Stipulation for filing amended petition filed.

July 22, 1968—Order allowing the filing of amended petition, filed.

July 22, 1968—Amended Petition for writ of habeas corpus, filed.

July 22, 1968—Stipulation of record to be relied upon in hearing before this court, filed.

July 22, 1968—Order limiting evidence to be used in hearing before this court, filed.

August 7, 1968—Answer of respondent to amended petition for writ of habeas corpus, filed.

August 29, 1968—Petitioner's memorandum in support of amended petition for writ of habeas corpus, filed.

August 29, 1968—Respondent's memorandum in opposition to petition for writ of habeas corpus, filed.

August 29, 1968—Record, per stipulation of 7-22-68, to be relied upon, including No. 2885 Crim. Carbon County, No. 3461, Wyo. Supreme Court, and exhibits, 2 briefs, received, and list filed.

Sept. 4, 1968—Petitioner's reply memorandum filed.

Sept. 6, 1968—Trial to Court. Commenced and concluded this date. Counsel for both parties given 30 days in which to file simultaneous briefs with proposed findings of fact and conclusions of law.

Nov. 25, 1968—Judge's memorandum, filed.

Nov. 25, 1968—Judgment denying petition of Harold Whiteley for writ of habeas corpus.

Dec. 19, 1968—Notice of Apeal filed by Petitioner.

Dec. 24, 1968—Motion of Petr. for leave to proceed on appeal in forma pauperis, filed.

Dec. 24, 1968—Order granting leave to proceed on appeal in forma pauperis, filed.

Sept. 30, 1969—Opinion and judgment of the Court of Appeals for the Tenth Circuit.

UNITED STATES DISTRICT COURT
DISTRICT OF WYOMING

Case No. 5185

HAROLD WHITELEY, Register Number 9789, PETITIONER

—vs—

STATE OF WYOMING, RESPONDENT

AMENDED PETITION
Filed July 22, 1968

1. Place of detention Wyoming State Penitentiary
2. Name and location of court which imposed sentence Carbon County District Court, Rawlins, Wyoming.
3. The case number and the offense or offenses for which sentence was imposed:

   (a) Criminal Number 2885
   (b) Breaking into a locked or sealed building
   (c) Violation of Habitual Criminal Act

4. The date upon which sentence was imposed and the terms of the sentence:

   (a) June 1, 1965
   (b) One to ten years
   (c) Life imprisonment

5. Check whether a finding of guilty was made after a plea:

   (a) of guilty; or
   (b) of not guilty X; or
   (c) of nolo contendere; or

6. If you were found guilty after a plea of not guilty, check whether that finding was made by:

   (a) a jury X; or
   (b) a judge without a jury; or

7. Did you appeal from the judgment of conviction or the imposition of sentence? Yes
8. If you answered "yes" to (7), list:
   (a) the name of each court to which you appealed:
   i. Supreme Court of the State of Wyoming
   (b) The result in each such court to which you appealed and the date of such result:
   i. Judgment affirmed, September 15, 1966
9. If you answered "no" to (7), state your reasons for not so appealing:

   Not Applicable

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
   (a) The imposition of one penalty for the crime of breaking and entering (one to ten years), plus the imposition of an additional penalty under the Habitual Criminal Act (life imprisonment), constituted a violation of petitioner's rights (1) not to be put in jeopardy twice for the same offense under the Fifth Amendment, and (2) to due process of law under the Fourteenth Amendment, of the United States Constitution, since, in effect, the court convicted and sentenced petitioner twice for one illegal act.
   (b) The trial court deprived petitioner of his rights to counsel and due process under the Sixth and Fourteenth Amendments of the United States Constitution when that court imposed sentence upon petitioner under the Wyoming Habitual Criminal Act without evidence that petitioner's right to representation by counsel was adequately protected in the proceedings resulting in those prior convictions on which the Habitual Criminal penalty was based.
   (c) The arresting officers had no probable cause to arrest petitioner, because the warrant pursuant to which they acted was not valid. It was not

valid because it was issued upon an invalid complaint. Thus, the search and seizure at the time of the arrest was not made incident to a lawful arrest, and was therefore invalid. The evidence obtained by the officers at that time should not have been admitted at petitioner's trial.

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) Evidence taken from the trunk of petitioner's car was introduced to establish the guilt of petitioner on the charge of breaking and entering, to which charge petitioner pled not guilty. Evidence as to three prior convictions for felonies was admitted to establish petitioner's guilt on the charge of being an habitual criminal, to which charge petitioner also pled not guilty. On the first charge, petitioner was found guilty and sentenced to prison from one to ten years. On the second charge, petitioner was found guilty and sentenced to life imprisonment. Both sentences were based upon the commission of one illegal act.

(b) During the course of the trial, the state offered three judgments in evidence as proof of three prior convictions. The 1942 judgment (State's Exhibit 23) bears no evidence that petitioner was afforded representation in the course of said proceeding, nor is there contained therein any evidence that with respect to this conviction petitioner intelligently waived his right to counsel, under the rule of *Gideon*. Nor was any independent evidence offered at the trial to establish these facts.

(c) The warrant was issued upon an affidavit which was merely conclusory and which did not indicate any probable cause. This affidavit, in the complaint, said, "I, C. W. Ogburn, do solemnly swear that . . . the said Harold Whiteley and Jack Daley, defendants, did then and there un-

lawfully break and enter a locked and sealed building owned by Charles Gould, to-wit: [describing the realty] . . . Contrary to the form of the Statute in such case made and provided and against the peace and dignity of the State of Wyoming." No facts indicating probable cause are included in this complaint. The affiant Sheriff of Carbon County put out a state item requesting that I be apprehended. Officers in Laramie made the arrest.

12. Prior to this petition have you filed with respect to this conviction:

(a) any petition in a State Court? Yes
(b) any petitions in a State court by way of statutory *coram nobis*? No
(c) any petitions in State or Federal Courts for habeas corpus? No
(d) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No
(e) any other petitions, motions or applications in this or any other court? No

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. An application for post-conviction relief

(b) the name and location of the court in which each was filed:

i. Carbon County District Court, Rawlins, Wyoming

(c) the disposition thereof and the date of such disposition:

i. Denied, June 5, 1967

(d) If known, citations of any written opinions or orders entered pursuant to each such disposition:

i. None

14. Has any ground set forth in (10) been previously presented to this or any other court, state or federal, in any petition, motion or application which you have filed? Yes

15. If you answered "yes" to (14), identify:

(a) which grounds have been previously presented:

i. There was no probable cause supporting the arrest.

(b) the proceedings in which each ground was raised:

i. The appeal to the Wyoming Supreme Court from the original conviction, and in the application for post-conviction relief.

16. If any ground set forth in (10) has not previously been presented to any court, state or federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

Not Applicable.

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? Yes
(b) your trial, if any? Yes
(c) Your sentencing? Yes
(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes
(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Yes

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

i. Mr. C. L. Bates, Rawlins, Wyoming
ii. Mr. Richard V. Thomas, Cheyenne, Wyoming
iii. Mr. Samuel T. Ishmael, Rawlins, Wyoming

(b) the proceedings at which each such attorney represented you:

i. Arraignment and plea, trial, sentencing
ii. Appeal to Wyoming Supreme Court
iii. Post-conviction relief hearing

(c) was said attorney:

i. appointed by the Court? Yes; or
ii. of your own choosing? .....

19. If your petition is based upon the trial court's refusing you counsel, attach the transcript of the proceedings which supports your allegation.

20. If your petition is based upon the failure of counsel to adequately represent you, state concisely and in detail what counsel failed to do in representing your interests:

Not Applicable.

21. If you are seeking leave to proceed in forma pauperis, have you completed the sworn affidavit setting forth the required information (see instructions, page 1 of this form)? Yes

/s/ HAROLD W. WHITELEY
Signature of Petitioner

State of Wyoming)
) ss
County of Carbon)

I, Harold Whiteley, being duly sworn upon my oath depose and say that I have subscribed to the foregoing petition; that I know the contents thereof; and that the matters and allegations therein set forth are true.

/s/ HAROLD W. WHITELEY
Signature of Affiant

SUBSCRIBED AND SWORN to before me this 3rd day of July, 1968.

/s/ JAMES ENGSTROM
Notary Public

My commission expires:

May 1, 1970
(month, day, year)

FORMA PAUPERIS AFFIDAVIT

I, Harold Whiteley, being first duly sworn according to law, depose and say that I am the defendant in the above-entitled cause, and, in support of my application for leave to proceed in said cause without being required to prepay fees or costs, state as follows:

1. That I am a citizen of the United States.
2. That because of my poverty I am unable to pay the costs of this action.
3. That I am unable to give security for the same.
4. That I was unable to pay the costs of my trial, my appeal to the Supreme Court of Wyoming, or my application for post-conviction relief.
5. That I believe I am entitled to the redress I seek in this action.

/s/ HAROLD W. WHITELEY
Signature of Petitioner

State of Wyoming)
) ss
County of Carbon)

I, Harold Whiteley, being first duly sworn upon my oath, depose and say that I have subscribed to the foregoing affidavit; that I know the contents thereof; and that the matters therein set forth are true.

/s/ HAROLD W. WHITELEY
Signature of Affiant

SUBSCRIBED AND SWORN to before me this 3rd day of July, 1968.

/s/ JAMES ENGSTROM
Notary Public

My commission expires:

May 1, 1970
(month, day, year)

STIPULATION

Filed July 22, 1968

IT IS HEREBY STIPULATED by and between the parties through their respective counsel that, pursuant to the agreement of the parties in open court on February 16, 1968, both sides will rely exclusively on the record before the trial court in the original case of the State of Wyoming v. Harold Whiteley, Criminal No. 2885 in the Carbon County District Court, Rawlins, Wyoming and any and all parts of the record on appeal to

the State of Wyoming in Case No. 3461 in the hearing on the merits of this case before the above entitled court.

DATED this 22 day of July, 1968.

ATTORNEYS FOR PETITIONER

/s/ MAXWELL E. OSBORN
MAXWELL E. OSBORN

/s/ WILLIAM J. KNUDSEN, JR.
WILLIAM J. KNUDSEN, JR.

WYOMING DEFENDER AID PROGRAM
Room 109, Law School
University of Wyoming
Box 3035 University Station
Laramie, Wyoming 82070

STATE OF WYOMING,
Respondent

By /s/ JACK SPEIGHT
JACK SPEIGHT
Assistant Attorney General
State of Wyoming
210 Capitol Building
Cheyenne, Wyoming

ORDER

Filed July 22, 1968

Pursuant to the stipulation of the parties dated July 22, 1968, it is hereby ordered, adjudged and decreed that the hearing on the merits of this case shall be limited to evidence contained in the record before the trial court in the original case of the State of Wyoming v. Harold Whiteley, Criminal No. 2885 in the Carbon County District Court, Rawlins, Wyoming and any and all parts

of the record on appeal to the State of Wyoming in Case No. 3461 in the hearing on the merits of this case before the above entitled court.

DATED this 22 day of July, 1968.

EWING T. KERR
Judge

ANSWER TO AMENDED PETITION
FOR WRIT OF HABEAS CORPUS

Filed August 7, 1968

COMES NOW Respondent, through its attorney, Jack Speight, Assistant Attorney General for the State of Wyoming, and for its answer to the Amended Petition of Harold Whiteley states:

FIRST DEFENSE

The Petitioner has failed to state sufficient facts and information in his Petition to present a claim upon which relief can be granted.

SECOND DEFENSE

The Respondent admits all of the allegations contained in paragraphs 1 through 8, 12, 13, 14, 17 and 18 of Petitioner's Amended Petition For Writ of Habeas Corpus submitted to this Court.

THIRD DEFENSE

Respondent denies each and every allegation and conclusion of law set forth in paragraphs 10 and 11, and further, specifically states in response to Petitioner's allegations contained in paragraph 15 of his Amended Petition that all issues that are raised before the United States District Court for the District of Wyoming are issues that have been raised and fully litigated and dis-

posed of before. These issues have been raised either in the State District Court for the Second Judicial District, State of Wyoming, or the Wyoming State Supreme Court.

FOURTH DEFENSE

Respondent further states that an answer is not required to paragraphs 9, 16, 19 and 20 of Petitioner's Amended Petition for habeas corpus relief.

WHEREFORE, Respondent prays that the Amended Petition for Habeas Corpus relief of Harold Whiteley be dismissed and disallowed, and that the Petitioner be remanded to the care, custody and control of the Warden of the Wyoming State Penitentiary, Rawlins, Wyoming.

STATE OF WYOMING,
Respondent

By: /s/ JACK SPEIGHT
JACK SPEIGHT
Assistant Attorney General
State of Wyoming
210 Capitol Building
Cheyenne, Wyoming

CERTIFICATE OF SERVICE

I, Jack Speight, Assistant Attorney General, State of Wyoming, do hereby certify that a true and correct copy of the foregoing "ANSWER TO AMENDED PETITION FOR WRIT OF HABEAS CORPUS" was served upon the Petitioner, Harold Whiteley, by placing a copy of the same in the United States Mail, postage prepaid, this 6 day of August, 1968, addressed as follows:

Mr. Harold Whiteley, Register No. 9789
c/o Warden, Wyoimng State Penitentiary
Rawlins, Wyoming 82301

In addition I further certify that a true and correct copy of the foregoing "ANSWER TO AMENDED PETI-

TION FOR WRIT OF HABEAS CORPUS" was served upon William Knudsen, Director of the Wyoming Defender Aid Program and Maxwell E. Osborn, Attorney for Petitioner, by placing separate copies of the Answer in the United States Mail, postage prepaid, this 6 day of August, 1968, addressed as follows:

Mr. William Knudsen, Director
Wyoming Defender Aid Program
College of Law
University of Wyoming
Laramie, Wyoming 82070

Mr. Maxwell E. Osborn
Attorney at Law
1807 Capitol Avenue
Teton Building
Cheyenne, Wyoming 82001

/s/ JACK SPEIGHT
JACK SPEIGHT
Assistant Attorney General

IN THE DISTRICT COURT
SECOND JUDICIAL DISTRICT

STATE OF WYOMING)
) SS
COUNTY OF CARBON)

Criminal Case #2885

THE STATE OF WYOMING, PLAINTIFF

—*vs*—

HAROLD WHITELEY, DEFENDANT

TIME: 3:20 P.M. ARRAIGNMENT DATE: 12-22-64

BEFORE THE HONORABLE GLEN G. STANTON, DISTRICT JUDGE, SECOND JUDICIAL DISTRICT OF WYOMING.

APPEARANCES: Mr. John V. Crow, County & Prosecuting Attorney, Sheriff Ogburn, Carbon County, Wyoming and Mr. C. L. Bates, Attorney at Law, representing defendant, Whitley.

* * * *

Q. Do you wish the Information to be read?

MR. BATES: No, if the Court please, we would waive the reading of the Information and the defendant would like to enter a plea of not guilty, but before he enters a plea of not guilty, he would like to have the right to attack the search and seizure and it would certainly justify the same for the purpose of the record if we would but he is ready to plead with that reservation.

THE COURT: Do you know about that?

MR. BATES: Just merely for protection. There is a question that when they plead, if they want to attack the search and seizure, after they would plead but they could reserve the right. We don't know where we are going—whether we are going to avail ourselves of that, but just merely to protect the record, if they did subse-

quently want to file a motion to attack this search and seizure.

MR. CROW: If the Court please, it is my understanding, during the preliminary hearing, the defendant made a motion to quash the evidence on the grounds that it was illegally obtained. Is that the same motion?

MR. BATES: Yes, exactly the same motion and just merely for protection.

THE COURT: I will allow a plea of not guilty and waive any rights.

MR. BATES: I don't think it would Judge. Just to be sure and to be sure the rights are protected.

MR. CROW: I don't have any objection to that observation so long as the plea is made, your Honor.

THE COURT: All right. I don't think it's necessary, I think if you plead not guilty, you—

MR. BATES: Everything at issue. I think your point is very well taken, Judge. I feel that I'm obligated to them to do that.

THE COURT: Well, it's a little—do you wish to plead not guilty?

A. Yes.

STATE'S EXHIBIT 2

Filed September 6, 1968

PD-4

LARAMIE POLICE DEPARTMENT

COMPLAINT REPORT C No. D 265

Name of Complainant:

S. O. State item 881

Address of Complainant: Telephone:

Crime Classification: Place of Occurrence:

PU and H

Date and Time of Occurrence:

11/24/64

Subjects or Suspects:

No. 1 Jack Daley Address Unknown
No. 2 Harold Whitley Address Unknown
No. 3 ..... Address .....

Details of Complaint: These two suspected in several burglaries in Carbon County in the past few days. S. O., Laramie has reason to believe a warrant will be issued on these two subjects.

Subjects driving a tutone green (dark over light) Buick, Model somewhere in the 1950's 1964 Wyoming 2—balance unknown.

Property Stolen: (Describe and Give Value) .....

.....

.....

..... (Use over if more space needed)

Description of Subjects or Suspects	No. 1	No. 2	No. 3
Name			
Sex			
Color (race)			
Age (birth date) (place)			
Height			
Weight			
Eyes			
Hair			
Peculiarities, Etc.			

11 PM

Complaint received by: Sinon

Date and Time Received: 11/24/64 4:00 p.m.

Assigned to: All

Date and Time Assigned: 19 m.

Investigation: I observed this vehicle going east over the Clark Street viaduct and followed it to Ivinson where it turned west and stoped this vehicle in front of the Hoppe Hotel. At this time I radioed the other units that I had stopped the vehicle in front of the Hoppe Hotel. The subjects were then arrested for Investiagtion. By this time Sgt. Kersting and Undersheriff Lankford arrived at the scene. Sgt. Kersting and Undersheriff searched the car. In the car was found a large quanity of burglar tools and old &&& coins.

(Attach sheet if more space needed)

Also submitted or to be submitted:

Arrest Report ..... A No. .....
Accident Report ..... B No. .....
Investigation Report ..... D No. .....
Traffic Ticket ..... T No. .....
Supervisor's Notations .....

In the glove compartment of the car was found a loaded P-38 pistol, This pistol was found by Sgt. Kersting. The subjects were then taken to the Sheriffs Office.

D. C. ROGERS
/s/ D. C. Rogers

November 24, 1964

ATTENTION ALL OFFICERS

P U & H for Investigation of burglary:

1. Jack DALEY
2. (?) WHITLEY

driving a tutone green (dark over light) Buick, model somewhere in the 1950's, 1964 Wyoming 2—balance unknown.

These two subjects are suspected in several burglaries in Carbon County in the past few days. S. O., Laramie has reason to believe a warrant will be issued on these two subjects.

State Item—881

Auth: CHIEF TRABING

I observed this vehicle going east over the Clark Street viaduct and followed it to Ivinson where it turned west and stopped this car in front of the Hoppe Hotel. Both Subjects were placed under arrest for Investigation. The car was then searched by Undersheriff Lankford and Sgt. Kersting. There was a large quantity of burglar tools found in the car with a large quantity of old coins. There was loaded P-38 pistol found in the glove Compartment of the car. Subjects were then taken to the Sheriffs Office.

D. C. ROGERS

11/30/64
LaVerne Trabing
Chief of Police
Laramie, Wyoming

Dear Sir:

On the 24th of November, 1964, Jack O. Daley and Harold Whitley were arrested by Laramie Police Officers Kersting, Rogers and Norberg and Undersheriff Lankford. This arrest was made for the Carbon County Sheriff, Rawlins, Wyoming, in connection with four (4) burglaries in the Carbon County area. A large assortment of burglar tools and stolen property from these burglaries was found in the car. Both subjects were turned over to Carbon County authorities on Nov. 25, 1964.

Officers Overman and Foreman went to Rawlins Nov. 25, 1964 and Officer Foreman interrogated Jack Daley. Daley admitted participating in some way in the following burglaries: (Daley at this time would give no details as to who was involved, how committed, what obtained, etc. He stated that at a future date he would contact Officer Foreman and advise on other burglaries and details).

Sally's Cafe—C#64-00625, 4/1/64—$91.00 taken.

The Bowl—C#63-01497, 8/28/63 (valuable coin collection taken) or C#64-00839, 5/4/64—$60.00 and 9MM Luger taken.

McConnell Brothers—C#64-00871, 5/13/64—approximately $45.00 taken from safe.

Medical Dental Group—C#64-00923, 5/21/64—Undetermined amount of money taken from safe.

Laramie Auto Parts—D-049, 7/30 or 7/31/64—$1500.00 taken from safe.

Buckhorn Bar—C#61-02878, 10/26/61—$600.00 taken.

Greens' Groceries & Meats—C#64-00322, 1/31/64—Nothing reported missing.

Also admitted burglarizing Pat Self's Old Corral, Centennial, Wyoming, date and details unknown. (This place has been burglarized 3 or 4 times in the past 2 years).

Jack O. Daley also stated that the following subjects he knew were in some B & E's that he would give to the Laramie Police Department when he knew he was safe from harm.

Lonnie C. Norman
Charles Patton
Henry Phillips
McKinnley Benson
Lonnie Cotton
Tree Top Swinton.

Respectfully submitted,

/s/ Jerry Overman
JERRY OVERMAN
Sgt. Detectives

/s/ Stanley E. Foreman
STANLEY E. FOREMAN
Patrolman

PD-10—1.5M—1-65

LARAMIE POLICE DEPARTMENT
Laramie, Wyoming

DATE 11/24/64

TIME ..... A.M.
P.M.

C. No. D-265

I was on duty, as a Patrolman for the Laramie Police Department, on the 4 to 12 midnight shift the evening of November 24, 1964. When I reported for duty at 3:15 p.m. I found a state message 881 had been given to the Laramie Police Department to pick-up and hold one Jack Daley and one Harold Whitley for investigation of breaking and entering at Saratoga the night of November 23, 1964.

At 7:00 p. m., after my dinner, I made several telephone calls to people in Laramie who know Daley. I asked them if they had seen either Daley or Whitley in the City of Laramie during that day. One of the persons I called said that he had seen Daley the day before working in a lumber camp on Spruce Mountain. Det. Bernaski was notified of the information I received on the phone. Det. Bernaski then talked to the informant in person, and it was discovered that the informant had either given us wrong information or misunderstood the name of the suspect. The informant had thought the name of the suspect was Jack Taylor. At about 10:30 p. m. the same informant called the Police Station and asked for an officer to come to his home and talk about Jack Daley. Sgt. Kersting was sent to answer this call. A short time later Sgt. Kersting radioed all units that Daley had just left a house across from the Laramie airport and was on his way to Cheyenne. At the time of the radio call from Sgt. Kersting I was checking buildings at 2d and Lewis Streets. Occupants in my patrolcar at this time were John Norberg, an off-duty patrolman, and myself, Delbert C. Rogers. After receiving the radio call we proceeded to Clark St. and travelled west over the Clark St. viaduct to wait for the suspects at

the West Laramie interchange at highway 130-230 and interstate 80. While we were crossing the viaduct I asked Norberg to load the shotgun. In the 200 block of North Cedar St. a blue and white 1955 Buick was spotted coming north on Cedar St. This vehicle had one male subject driving and a second male in the front passenger seat. The vehicle also had a 1964 Wyo. license plate 2-A96. After spotting the above vehicle we turned around and followed it east over the Clark St. viaduct. As we drove across the viaduct all other units were radioed giving them information as to the license number, color, year and make of the vehicle. Sgt. Kersting radioed back to us to follow the vehicle and not stop it if it drove east on Grand Ave. At the foot of the viaduct the vehicle turned south on 3rd St. The vehicle proceeded to 3rd and Ivinson and turned west. The vehicle stopped for a stop light at 2d and Ivinson and then parked in front of the Hoppe Hotel at 115 Ivinson Ave. As soon as the vehicle stopped the driver got out and started across the street. I called to the driver and asked him to return to the patrolcar, which was then parked. When he returned to the patrolcar, I asked his name. He replied, giving me a name that I cannot remember at this time, but it was not Whitley. We then placed the suspect against the patrolcar and asked him if Daley was in the car. The person thought to be Whitley remarked, "Is that his name?" I looked through the back window of the Buick at the person thought to be Daley in the front seat. Patrolman Norberg, with the shotgun, watched the suspected Whitley, while I walked to the front door of the Buick and reached down to open the door. The door was locked, and then the suspect in the front seat turned and unlocked the door with his left hand. After he unlocked the door, I opened it and preliminarily identified him as the suspect Daley. I asked him to get out of the car and walked with him back to the patrolcar. Patrolman Norberg stayed with him on the right side of the patrolcar, while I returned to the left side of the car to watch the person thought to be Whitley. At this time Undersheriff Langford drove up from the east and got out of his car. Also at this time Sgt. Kersting drove up across the street from the west. As Sgt. Kersting drove

up Undersheriff Langford walked up beside Daley. As to reassure myself that we had stopped the right vehicle, I asked Langford "That is Daley, isn't it?" Langford replied that it was. Sgt. Kersting got out of his car and walked across the street to us. Undersheriff Langford then told both suspects that they were under arrest for investigation of burglary. Whitley looked up and asked burglary of what? Langford answered "Four burglaries in Saratoga last night." From this time on Whitley made only one or two more statements. When Sgt. Kersting arrived he searched Whitley. When he finished I handcuffed Whitley and placed him in the back seat of the patrolcar on the left side. I don't know whether Langford or Kersting searched Daley, but when they were finished he was placed in the back seat of the patrolcar on the right side. Sgt. Kersting and Undersheriff Langford then proceeded to search Whitley's vehicle. I stayed by the front door of the patrolcar in order to watch both suspects and hear anything that might be said between them. Sgt. Kersting searched the front of the vehicle, while Undersheriff Langford searched the trunk. I took a hand spot-light from the patrolcar and turned it on with the light directed to shine inside the trunk of Whitley's vehicle, in order to assist Undersheriff Langford. Sgt. Kersting removed a German made automatic pistol from the vehicle, and after unloading it, he returned to the search. The next items that were found, came from the trunk. They were a carpenters' wrecking bar, a black bag with a zippered top, which was opened by Langford, and from where I was standing I noticed it contained a hammer, punch and number of other tools. The search was continued inside of the vehicle, but from where I was standing I didn't see any other items that were found. As Sgt. Kersting finished the search inside of the car he removed a brown paper sack. Patrolman John Norberg then got into Whitley's car and started the vehicle. Sgt. Kersting and Undersheriff Langford both returned to their vehicles with the items of evidence they had found. Undersheriff Langford backed up his vehicle and made a U turn and led the line of cars to the Sheriff's Office. As Langford turned into the street,

I started the patrolcar with both suspects in it, and after backing up and making a U turn, I followed Undersheriff Langford, with Sgt. Kersting behind me, and Patrolman Norberg in the rear with Whitley's vehicle.

From the time that Whitley had stopped his vehicle in front of the Hoppe Hotel until we were proceeding in line to the Sheriff's Office, the time lapse amounted to about 10 minutes.

At the Sheriff's Office we took Daley and Whitley from the patrolcar and led them inside. Sgt. Kersting and Undersheriff Langford brought the items of evidence confiscated from Whitley's car into the Sheriff's Office. Inside the Office Whitley had his handcuffs removed, was again searched, and was placed inside of a small room. About one-hundred and seventy dollars was removed from Whitley's billfold. Daley was then searched and placed in another room. His billfold contained about seventy dollars. We then checked the cotnents of the black bag and the paper sack. The black bag contained two punches, one chisel, one 6 or 8 lb. hammer, one small ball-peen hammer, one pair of water pump pliers, three screwdrivers, and the wrecking bar that Undersheriff Langford had placed in it from the trunk of Whitley's vehicle. These items were all tagged as evidence. From the brown paper sack we removed a pair of socks. Inside the socks were found a number of old coins. These coins matched the description of a list of coins that Sheriff Osburn had given us, and were taken in the burglaries. The coins were returned to within the socks and tagged as evidence. Sgt. Kersting and myself then turned Whitley and Daley over to Undersheriff Langford along with the tools, money, and car, and we returned to the Police Station to make out our reports.

We left the Sheriff's Office at 11:30 p. m. From the time that the vehicle was first stopped until Whitley and Daley were turned over to Undersheriff Langford the time lapse had amounted to about 40 minutes. The majority of this time was consumed in the searching and tagging of all evidence found on the suspects and in their vehicle.

/s/ Delbert C. Rogers

STATE'S EXHIBIT 3

Filed September 6, 1968

CRIMINAL WARRANT—FORM NO. 94—SPECIAL

THE STATE OF WYOMING)
) ss,
County of Carbon)

TO THE SHERIFF OR ANY CONSTABLE OF SAID COUNTY, GREETING:

Whereas C. W. Ogburn has this day complained to me, on oath, that Harold Whitely and Jack Daley did on or about the 23 day of Nov. A. D. 1964, at Saratoga in the County and State aforesaid did then and there unlawfully break and enter a locked and sealed building owned by Charles Gould, to-wit: the building located on the West 22′ and West 14′ of the East 38′ of the South 75′ of Lot 1, Block 1, of the Hugus and Chatterton's First Addition to the Town of Saratoga, Carbon County, Wyoming, Contrary to the form of the Statute in such case made and provided and against the peace and dignity of the State of Wyoming and prayed that the said Harold Whitely and Jack Daley might be arrested and dealt with according to law. Now, therefore, in the name of the State of Wyoming, you are hereby commanded forthwith to apprehend the said Harold Whitely and Jack Daley and bring them before me to be dealt with according to law.

Given under my hand this 24 day of Nov. A. D. 1964.

/s/ O. E. Castle
Justice of the Peace

THE STATE OF WYOMING)
) ss.
County of Carbon)

I hereby certify that I received the within Warrant on the 24th day of November 1964 at 4:00 o'clock P.M., and served the same at the County and State aforesaid by arresting the within named Defendant Harold Whiteley and Jack Daley and by informing him of the within contents, and brought him into Court before J. P. O. E. Castle, a Justice of the Peace in and for Carbon County, Wyoming, this, the 25th day of November, 1964.

/s/ C. W. Ogburn
Sheriff

By /s/ Frank McDonald
Deputy Sheriff

Sheriff's Expense, $.....

STATE'S EXHIBIT 4

Filed September 6, 1968

Before O. E. CASTLE, Justice of the Peace

THE STATE OF WYOMING

vs.

HAROLD WHITELY and JACK DALEY, DEFENDANTS

THE STATE OF WYOMING)
) ss,
County of Carbon)

I, C. W. Ogburn, do solemnly swear that on or about the 23 day of November, A. D. 1964, in the County of Carbon and State of Wyoming, the said Harold Whitely and Jack Daley, defendants did then and there unlawfully break and enter a locked and sealed building owned by Charles Gould, to-wit: the building located on the West 22′ and West 14′ of the East 38′ of the South 75′ of Lot 1, Block 1, of the Hugus & Chatterton's First Addition to the Town of Saratoga, Carbon County, Wyoming. Contrary to the form of the Statute in such case made and provided and against the peace and dignity of the State of Wyoming.

Signed C. W. Ogburn

Subscribed and sworn to before me this 24 day of Nov., 1964.

/s/ O. E. Castle
Justice of the Peace

Rawlins 12/7/64

Waived reading of Complaint
Pleas of not guilty

Bound to District Court $10,000 Bond each

STATE'S EXHIBIT 5

Filed September 6, 1968

WYOMING STATE HIGHWAY DEPARTMENT

COMMUNICATIONS DIVISION

BASE STATION LOG

Sheet No. 4

Date Nov. 24, 1964

Location Rawlins

Frequency 42:82 Power Input 500 Call Letters KOF268

Frequency 47:22 Power Input 500 Call Letters KOF270

Frequency ..... Power Input ..... Call Letters .....

STATION TO	STATION FROM	TEXT OF MESSAGE	TIME
	C44	Ref. 2-448N - green with black passed car last night about 9:00 P.M. 11-23-64 headed W.	2:13
X51		Ref. Whitley dr. green & black Buick [illegible]	2:20
	X24	Msg #28K10	2:22
X24		Ref. Msg #28K10	2:25
	C-366	PX Pen Need info on Donald Redman CRR	2:36
	P-76	10-10 2737 CRR	2:41
X44		Ref-info on red & black '54 or '55 Buick Belongs to Chester Daniels CRR	2:47
	C-366	Will be in upper valley out of contact CRR	2:53

STATION TO	STATION FROM	TEXT OF MESSAGE	TIME
	X24	Item #880 CRR	2:58
*X24		10-52 10-60 Item #881 CRR	3:03*
	X24	Item #882	3:26
	P-75	Shop	3:28
	P-76	10-8	3:30
	P-75	10-8	4:00
	P-75	2741	4:11
	P-75	10-8 Sinclair West bound	4:18
P-49		Ref. PackageP[illegible]	4:27 P.M.
	P-49	10-58 on Robert Pountney	4:39
X-44		Mess 12-K-24	4:46
P-49		it will be tomorrow on that mess 10-9	4:46
	C438	Eastbound	4:47
	X-44	Mess 1362 KAA 594	5:11
	P-8	10-42	5:12
P-75		Mess 1362 KAA 594	5:13

WYOMING STATE HIGHWAY PATROL OFFICIAL RADIO LOG
Page Number 219

Radio Station KOF268 42.82 MC
Location Rawlins, Wyoming
Power 500 Watts

[881]

	ACTIVE	CANCELLED
DATE	303 P.M. Nov. 24, 1964	11-25-64 5:30 A.M.
FR.	Casper	
TO.	All	Casper
OPR.	CRR	CWP
GIVEN TO	All	All

[Cancelled]

P & H for B & E Saratoga, early A.M. 11-24-64. Subj. #1. Jack Daley, WMA, 38, D.O.B. 2-29-65, 5'10", 175, med. build, med. comp., blonde and blue. Tat. left shoulder: "Love Me or Leave Me". #2. Harold Whitley, WMA, 43, D.O.B. 6-22-21, 5'11", 180, med. build, fair comp. brown eyes. Tat. on right arm "Bird". Poss. driving 1953 or 1954 Buick, light green bottom, dark top. Wyo. lic. 2- bal. unknown. Taken: $281.71 in small change, numerous old coins ranging from .5¢ pieces to silver dollars, dated from 1853 to 1908. Warrant issues, will extradite. Special attention Denver. Use CODE 10-50.

Auth. S.O. Rawlins

Cncl. Info.

Auth: S. O. Rawlins

[Cancelled]

[882]

	ACTIVE	CANCELLED
DATE	11/24/64 3:26 P.M.	12-5-64 9:16 P.M.
FR.	Casper	Casper
TO.	All	All
OPR.	DDS	CWP
GIVEN TO	All	All

[Cancelled]

Stolen Gillette, sometime night 11/20/64. Coin collection valued at approximately $4,000. Large amount of Silver Dollars. List available.

Auth. S.O. Gillette

Cncl. Info.

Auth: S. O. Gillette

[Cancelled]

[883]

	ACTIVE	CANCELLED
DATE	11/24/64 9:33 P.M.	12-1-64 7:25 P.M.
FR.	Casper	Casper
TO.	CWP	All
OPR.	All	CWP
GIVEN TO	All	All

[Cancelled]

10-75 Memphis, Tenn. since 11/5/64. Lt blue 1965 Ford Galaxie 2dr. Tenn. lic. AD-1230. ID#5U66C108563. Poss. driven by Jerry lee Roger alais William Loomis, WMA, 42, 6'2", 160, Blond and blue. Acc. by deformed subject 18, lite build, blond bushey hair, old looking face Subject poss. involved in murder. Code 10-50 Notify FBI Cheyenne.

Auth. F-92 Cheyenne

Cncl. Info.

Auth: F.B.I. Cheyenne

[Cancelled]

[884]

	ACTIVE	CANCELLED
DATE	Nov. 25 1964	11-25-64 9:16 P.M.
FR.	Casper	Casper
TO.	All	All
OPR.	CRR	CWP
GIVEN TO	All	All

[Cancelled]

P & H runaway boy Worland, since 10:30 A.M. 11-24-64. James Miller, WMA, 15, 5'6", 130, brown and blue. Wearing tan cord pants, red, White & blue stripped shirt, reversable dark green and black jacket. Maybe with Edward Hourt, driving light blue 1956 Olds conv. Wyo. lic. 1-911V. Transportation furnished for Miller only.

Auth. S.O. Worland

Cncl. Info.

Auth: S. O. Worland

[Cancelled]

STATE'S EXHIBIT 6

Filed September 6, 1968

WYOMING STATE HIGHWAY PATROL OFFICIAL RADIO LOG

Page Number

Radio Station 42.82 MC
Location Wyoming
Power Watts

[879]

	ACTIVE	CANCELLED
DATE		
FR.		
TO.		
OPR.		
GIVEN		
TO		

Cncl. Info.

Auth:

[880]

	ACTIVE	CANCELLED
DATE		
FR.		
TO.		
OPR.		
GIVEN TO		

California MFO-78

Cncl. Info.

Auth:

[881]

	ACTIVE	CANCELLED
DATE	11/24 6/P	11/24
FR.	KOF 265	
TO.	APB	
OPR.	JOF	JOF
GIVEN TO		

P & H for B & E Saratoga since early AM 11/24/64 #1 Jack O. Daley WMA 38 years, DOB 2-29-26 5'10" 175# Medium build, Medium Complexion, Blond and Blue Has Tattoo left Shoulder "Love Me or Leave Me" #2 HAROLD WHITELY WMA 43 years DOB 6-22-21 5'11" 180# Medium build, fair complexion. brown eyes Tattoo right arm of a bird. Possibly driving a 1953 or 1954 Buick lite green bottom, dark green top WYO 2-Balance Unknown. Taken $281.71 small change. Numerous old coins from .05 to $1 dates from 1853 to 1908

Warex

Cncl. Info. Code 10-50

Auth: S.O. Rawlins

[882]

	ACTIVE	CANCELLED
DATE	11/24 6/P	12/5/64 9:20/
FR.	KOF 265	
TO.	APB	
OPR.	JOF	JOF
GIVEN TO		

[Cancelled]

Stolen late night of 11/20/64 Coin collection valued at $4000.00 large amount of silver dollars List available

Cncl. Info.

Auth: S. O. Gillette

[Cancelled]

STATE'S EXHIBIT 7

Filed September 6, 1968

CRIMINAL WARRANT—FORM NO. 94—SPECIAL

THE STATE OF WYOMING)
) ss.
County of Carbon)

TO THE SHERIFF OR ANY CONSTABLE OF SAID COUNTY, GREETING:

Whereas C. W. Ogburn has this day complained to me, on oath, that Harold Whitley did on or about the 23 day of Nov. A. D. 1964, at Saratoga in the County and State aforesaid did then and there unlawfully break and enter a locked and sealed building owned by Edward Shively, to-wit: the building located on Lots 1, 2, 3 & 4 the East 16′ of Lot 5, in Block 27, of the Saratoga Real Estate and Improvement Company's First Addition to the Town of Saratoga, Carbon County, Wyoming. Contrary to the form of the Statute in such case made and provided and against the peace and dignity of the State of Wyoming and prayed that the said Harold Whitley might be arrested and dealt with according to law. Now, therefore, in the name of the State of Wyoming, you are hereby commanded forthwith to apprehend the said Harold Whitely and bring him before me to be dealt with according to law.

Given under my hand this 27 day of Nov. A. D. 1964.

/s/ O. E. Castle
Justice of the Peace

THE STATE OF WYOMING)
) ss.
County of Carbon)

I hereby certify that I received the within Warrant on the 27 day of Nov. 1964 at 10:00 o'clock A.M., and served the same at the County and State aforesaid by arresting the within named Defendant Harold Whiteley and by informing him of the within contents, and brought him into Court before O. E. Castle a Justice of the Peace in and for Carbon County, Wyoming, this, the 27 day of Nov., 1964.

/s/ C. W. Ogburn
Sheriff

By /s/ Chuck Ross
Deputy Sheriff

Sheriff's Expense, $.....

STATE'S EXHIBIT 8

Filed September 6, 1968

CRIMINAL COMPLAINT—FORM NO. 94—SPECIAL

Before O. E. CASTLE, Justice of the Peace

THE STATE OF WYOMING

vs.

HAROLD WHITLEY, DEFENDANT

THE STATE OF WYOMING)
) ss.
County of Carbon)

I, C. W. Ogburn, do solemnly swear that on or about the 23 day of Nov., A. D. 1964, in the County of Carbon and State of Wyoming, the said Harold Whitley, defendant, did then and there unlawfully break and enter a locked and sealed building owend by Edward Shively, to-wit: the building located on Lots 1, 2, 3 & 4, the East 16' of Lot 5 in Block 27, of the Saratoga Real Estate and Improvements Company's First Addition to the Town of Saratoga, Carbon County, Wyoming. Contrary to the form of the Statute in such case made and provided and against the peace and dignity of the State of Wyoming.

Signed C. W. Ogburn

Subscribed and sworn to before me this 27 day of Nov., 1964.

/s/ O. E. Castle
Justice of the Peace

Waived reading of Complaint

Pleas of not guilty

Motion to suppress evidence $10,000 Bond

TESTIMONY OF JACK OLIVER DALEY

Filed September 6, 1968
In United States District Court, Civil No. 5185

IN THE DISTRICT COURT
SECOND JUDICIAL DISTRICT

Criminal Action No. 2885

STATE OF WYOMING)
) ss
COUNTY OF CARBON)

THE STATE OF WYOMING, PLAINTIFF

—*vs*—

HAROLD WHITLEY, also known as HAROLD W. WHITELEY, DEFENDANT

DIRECT EXAMINATION

* * * *

Q. And what part of town is that?

A. Well, it's in the main part of the town. The first place we went to was in back of the Rustic Bar.

Q. What did you do there?

A. I climbed up on a shed—

MR. BATES: Now, if the Court please, I would object to this line of questioning, because he is now going to testify to—well, his testimony—let me object to it first on the grounds where they went to other than the Shiveley Hardware Store would be incompetent, irrelevant and immaterial, would have no bearing whatsoever upon the issues in this case.

MR. CROW: Your Honor, may I address the Court.

THE COURT: Is this going to be an argument as to the admissibility of his testimony?

MR. CROW: No, if the Court please. I don't object to our restriction of the testimony, except that I want to outline it for the purposes of showing times, etc., where they were, what they did, etc..

THE COURT: Not what they did, just where they went?

MR. CROW: That is right.

THE COURT: I'll let it go in where they went, but not to go into detail; if there were other things done by them that were not pertinent to the charge.

MR. CROW: Yes, Your Honor.

Q. Now, Mr. Daley, you went to the back of the Rustic Bar?

A. Yes, sir.

Q. And from the back of the Rustic Bar, where did you go?

A. Well, I went down into the bar.

THE COURT: I think now we are getting into details of some other doings there that shouldn't be in the record; so I will strike that answer. I mean, that has nothing to do with the time, as you see it, does it?

MR. CROW: I'd like to ask one further question—and then don't answer, Mr. Daley.

Q. How long were you in the Rustic Bar, or at the Rustic Bar?

MR. BATES: Now, if the Court please I will object to that on the grounds it is incompetent, irrelevant and immaterial, no bearing whatsoever upon the issues in this case as to how long they were any place other than Shiveley's Hardware.

THE COURT: May I see counsel at the bench here.

(WHEREUPON, a discussion was held off the record.)

Q. Mr. Daley, after you arrived at the back of the Rustic Bar, how much time later was it that you left the Rustic Bar?

A. Approximately 30 minutes.

Q. And who was with you at that time?

A. Mr. Whiteley.

Q. Now, don't answer this question until Mr. Bates has an opportunity to object. Where then did you go?

A. We left the Rustic Bar and went across the street to the Shively Hardware.

Q. What did you do there?

A. We went around to the back side and proceeded to jimmy in the back door.

MR. BATES: Now, if the Court please, I didn't understand, may I ask the Court Reporter, Judge to—Mr. Reporter, will you read the answer please.

(WHEREUPON, answer number 7, was read by the reporter.)

Q. What did you do at the Shively Hardware?
A. We jimmied the back door.
Q. By, "we," who do you mean?
A. Harold Whiteley.
Q. What did Mr. Whiteley do?
A. What did he do?
Q. Yes?
A. He was working with the screwdriver to jimmy open the door.
Q. Was the door locked, Mr. Daley?
A. Yes, sir, from the inside.
Q. Where is that door located in the building?
A. About the center of the building.
Q. Where is the building located with reference to the Rustic Bar?
A. Across the street.
Q. Which direction, if you know?
A. South.
Q. And with respect to direction, where is the door in the building?
A. Be on the south side.
Q. And is that the side that faces the street.
A. No, sir, it is on the back side.
Q. Was it lighted?
A. No, it was reasonably dark.
Q. Was the building itself lighted?
A. There was a light on inside, yes, sir.
Q. Do you know who owned the building?

MR. BATES: Now, if the Court please, I will object to that on the grounds that it would merely be hearsay, it isn't the best evidence. He wouldn't have no knowledge as to who owned the building.

THE COURT: If he knows, he can answer.

THE WITNESS: I don't know.

THE COURT: Do you want to ask him if he knows. Go ahead and ask him.

THE WITNESS: I didn't know for sure who owned the building. I presumed—

MR. BATES: Now, if the Court please, I think he's answered. He says he doesn't know for sure who owned the building.

Q. (By Mr. Crow): Did you know what business was conducted in the building?

A. Yes, sir.

Q. And what business was conducted in the building?

A. It was a hardware business.

Q. Had you ever been in the store?

A. Yes, sir, I had.

Q. When had you been in the store before?

A. It was in June, in '64.

Q. Mr. Daley, didn't you and Mr. Whiteley then gain admission through the back door by jimming the lock?

MR. BATES: Now, if the Court please, I would object to that on the grounds that it is leading.

THE COURT: It is leading.

Q. Did you enter the building, Mr. Daley?

A. Yes, sir.

Q. Who entered with you?

A. Mr. Whiteley.

Q. How did you get in?

A. After breaking the windows out and reaching down inside and lifting the bar, we pushed the door open.

Q. What did you do after you entered the building?

A. We went towards the front of the building where I could watch out the windows to see if anybody was coming, and Mr. Whiteley went towards the safe.

Q. Where was the safe located?

A. There's kind of a little hallway going through the door, and as you get to the end of this hallway you have to turn to your right and then back to your right again, and then there's an office there where the safe is.

Q. Had you seen that safe before?

A. Yes, sir, I had.

Q. Did you know where it was located?
A. Yes, sir, I did.
Q. Do you know whether Mr. Whiteley knew where the safe was located?
MR. BATES: Now, if the Court please, that should be answered "yes" or "no."
THE COURT: He may answer, "yes" or "no."
A. I don't know.
Q. Did Mr. Whiteley go to where the safe was?
A. Yes, sir, he went there.
Q. Did you see him there?
A. Yes, sir.
Q. What did you do next, Mr. Daley?
A. I stayed around the front of the building for five or 10 minutes while Mr. Whiteley worked on the safe.
Q. Did Mr. Whiteley get the safe open?
A. He got two doors open, yes.
Q. What happened then?
A. I came back to the office where he was working and told him I could watch better from there, as I could see out the window on the east and also the window on the north, which is the front window.
Q. You testified that Mr. Whiteley had two of the doors open on the safe at this time?
A. Yes, sir.
Q. Was there another door?
A. There was a small compartment in the bottom of the safe which had another combination on it.
Q. Was that open, or closed?
A. It was closed.
Q. Did it remain closed?
A. Yes, sir.
Q. What did you do next?
A. Well, he tried to open it for a while and couldn't, so he thought about drilling, and I went to the front of the store and found a drill there and looked around in the store and found some drill-bits and brought them back to him.
Q. What did he do with them, if anything?
A. He tried to drill on the safe.
Q. Was he successful?

A. No, sir.
Q. What did you do next?
A. We left there and went across the street into a garage, and broke into the garage.

(Record, Vol. III, 77-83)

* * * *

MR. BATES: Now, if the Court please, I think this evidence is incompetent, irrelevant and immaterial, has no bearing whatsoever on the issues.
THE COURT: I think this is a little different situation. This is an itinerary, as I take it to be. You may answer.
A. Will you repeat the question again.
Q. Yes. How long did you remain at this lady's house across from the airport?
A. We left there about 11:30.
Q. Where did you go?
A. Into town.
Q. What happened next?
A. Mr. Whiteley wanted to see somebody in at the Buckhorn Bar.
Q. Did you go to the Buckhorn Bar?
A. We drove to across the street from it.
Q. What did you do there?
A. We noticed a squad car behind us and we pulled over to the curb. The squad car pulled in behind us and the red light came on.
Q. And what happened?
A. Mr. Whiteley got out of the car and started across the street to the Buckhorn. I sat in the car.
THE COURT: Can you hear at the other end of the box?
JUROR: Pretty good.

(Record, Vol. III, 89)

* * * *

Q. Mr. Daley, who was present during that conversation, besides yourself and Mr. Lankford?
A. The officer that first asked me to get out of the car, the one who was driving the squad car that was

parked behind us. Kenneth Lankford, the Undersheriff, two more officers was there, and Mr. Whiteley was on the other side of the car, his own car, and I was back by the police cruiser, which was about 10, 12 feet parked in back of Mr. Whiteley's car.

Q. Was anyone with Mr. Whiteley at this time?

A. Yes, sir.

Q. Who was with him?

A. One of the police officers.

Q. What was Mr. Whiteley doing?

A. At the time that Mr. Lankford arrived, one of the police officers was shaking him down.

Q. By shaking him down, what do you mean, Mr. Daley?

A. He had Mr. Whiteley put his hands up on the car and was patting his pockets and checking to see if he had any weapons or anything like that.

Q. Do you know whether Mr. Whiteley had a weapon?

A. Not on him.

Q. Well, did he have one somewhere else?

MR. BATES: I would object on the grounds that it is incompetent, irrelevant and immaterial.

THE COURT: Objection sustained.

(Record, Vol. III, 92-93)

* * * *

CROSS EXAMINATION

* * * *

Q. Did they serve any warrant on you?

A. Not at the time, no.

Q. Did they present you with any papers of any kind?

A. No, sir.

Q. Did they tell you what you were under arrest for?

A. Well, they said, "Suspicion of burglary in Saratoga."

Q. Was the trunk on the car locked?

A. Yes, sir.

Q. And where was the key to the trunk of the car?

A. I believe it was in the ignition switch.

Q. Who took the keys out of the car?

A. One of the arresting officers.
Q. Who opened the rear of the car?
A. I believe it was Kennie Lankford.
Q. Where were you and Whiteley when he took the keys out of the car?
A. Sitting in the back seat of the town police car.
Q. Sitting in the back seat of the police car?
A. Yes, sir.
Q. So then they had taken you and Mr. Whiteley from the Whiteley car and had put you into the police car?
A. Yes, sir.
Q. Prior to the time that they opened the Whiteley car, is that correct?
A. Yes, sir.
Q. And Prior to the time that they took the keys out of the ignition switch?
A. Yes, sir.
Q. Did they serve you with a search warrant?
A. No, sir.
Q. Did they say that they had a search warrant?
A. No, sir, they didn't.
Q. Was a search warrant discussed by anyone?
A. No, sir.
Q. In who's bag were the tools and the instruments that you say they took?
A. In who's bag was it?
A. Yes?
A. It was in Whiteley's bag.
Q. What kind of a bag was that?
A. A black leather satchel.
Q. Could you describe it with a little more detail for me?
A. It was approximately that long, 24 inches, and approximately that high, 12 to 18 inches high.
Q. A black suitcase, wasn't it?
A. No, it was a satchel type.
Q. And that bag belonged to Mr. Whiteley?
A. Yes, sir.

(Record, Vol. III, 97-98)

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Q. (By Mr. Bates): As a matter of fact, you were the one that entered the Shively Hardware store in Saratoga, Wyoming, weren't you?

A. No, sir.

Q. You weren't the one that opened the door?

A. No, sir. Mr. Whiteley reached through and lifted the bar off and pushed the door open.

Q. Then who opened the safe?

A. Mr. Whiteley opened the safe.

Q. You didn't have anything to do with it?

A. I was there, yes, I was watching out.

Q. Where were you located in the store?

A. When he opened the first two doors, I was towards the front part of the store.

Q. You had been in the store on several occasions, hadn't you, before?

A. Once.

Q. You had lived and worked in Saratoga, hadn't you?

A. I had lived there, I didn't have—officially have a job there, I was helping a friend of mine cooking in one restaurant, yes.

(Record, Vol. III, 103)

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Testimony of C. W. Ogburn

Filed September 6, 1968
In United States District Court, Civil No. 5185

DIRECT EXAMINATION

• • • •

Q. Mr. Ogburn, you were the sheriff in November of 1964, is that correct?

A. Yes, sir.

Q. On the 24th of November, 1964, did you have occasion to go to Saratoga?

A. Yes.

Q. And Saratoga is in Carbon County, is that correct?
A. Yes, sir.
Q. State of Wyoming, is that correct?
A. Yes, sir.
Q. And therefore within your jurisdiction as sheriff of this county?
A. Yes, sir.
Q. Where did you go in Saratoga?
A. I went to the Shively Hardware store.
Q. Did you have a deputy in Saratoga at this time?
A. Yes, sir.
Q. Had you received a call from your deputy in Saratoga?
A. Yes, sir, about 8:15 on this date.
Q. On the morning of November 24th?
A. Twenty-fourth, yes, sir.

(Record, Vol. III, 106)

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Q. What did you find at the Shively Hardware when you arrived, if anything?
A. An attempted safe job.
Q. Where is the safe located in the Shively building?
A. It is in the back room in an office to the south—it would be to the southeast, more-or-less the southeast part of the building in the hardware store.
Q. By attempted safe job, what do you mean?
A. Attempted safe job. That it had been attempted, but never actually got the safe open.

(WHEREUPON, State's exhibit 1, was marked for identification.)

Q. What, if any, were the indications on the safe that an attempt had been made to open it?
MR. BATES: Now, if the Court please. May I approach the bench—Mr. Crow.
THE COURT: Just a minute, don't answer, sheriff.

(WHEREUPON, a discussion was held of the record.)

Q. Sheriff Ogburn, after you went to the Shively Hardware store, did you conduct your investigation anywhere else?

A. Yes, sir.

Q. Where else?

A. Throughout the store and across the street at two other places.

Q. After you had finished your investigation, what did you do?

A. After we finished our investigation we come back to Rawlins, and through a tip, why, we put out an item, state item on two suspects of the robbery.

Q. Who were the two suspects?

A. Jack Daley and Mr. Harold Whiteley.

Q. Was a warrant issued for their arrest?

A. Yes, sir.

Q. At about what time, if you know?

A. That would have been approximately noon on the 24th, 1964, November.

Q. Who was the complaining witness in that warrant and complaint. Was it yourself?

A. Yes, sir, I signed the warrant.

Q. And who was the Justice of the Peace before whom this complaint was made?

A. That was O. E. Castle.

Q. Did you then receive a warrant from the Justice of the Peace?

MR. BATES: If the Court please, I suggest that the warrant and the complaint would be the best evidence.

THE COURT: Well, he can answer the question, then if you want him to produce it.

A. Yes, sir.

Q. At approximately what time did you receive the warrant?

A. That was around 11:30 a.m.

Q. Now, you testified that you put out a state item. Tell the jury what a state item is?

A. We have throughout the state, radio networks which we put out our state items for felonies, etc., in an attempt to locate suspects in the State of Wyoming. It is located—we put it through Casper and it is given

to the whole state. We keep a radio log. We cannot alter the log, they have to be kept in order, and you can't change them once that you put down a message or an item; and that's what radio messages are or items are in the state. They are for police and sheriff's officers, game and fish, law enforcement only.

Q. Now, Mr. Sheriff, did you relate in your item the fact that a warrant had been issued?

A. Yes, sir.

MR. BATES: If the Court please—well, I'm sorry.

A. Yes, sir.

Q. Do you have the radio log that reflects the matters that you have testified to?

A. Yes, sir.

Q. Where is it?

A. It is on my desk.

THE COURT: May I see counsel at the bench a minute.

(WHEREUPON, a discussion was held off the record.)

MR. CROW: If the Court please, may I dictate a stipulation into the record?

THE COURT: All right.

MR. CROW: It is stipulated by the defendant and the State of Wyoming, that a warrant was issued from the Justice of the Peace Court in Rawlins by O. E. Castle, Justice of the Peace at about noon on November 24, 1964, ordering the arrest of Jack Daley and Harold Whiteley, charging the crime alleged in the information.

MR. BATES: Now, if the Court please, I think the original—could I see the original, Mr. Crow, just to check the day.

MR. CROW: I don't have it.

MR. BATES: So stipulated, if the Court please.

Q. Mr. Sheriff, after the warrant was issued and the state item was put out, did you receive word that an arrest had been made of the two suspects named?

A. Yes, sir.

Q. Where were they located, if you know?

A. In Laramie, Wyoming, Albany County.

Q. Did you go to Laramie?
A. Yes, sir.
Q. What time did you go to Laramie?
A. I left here about, oh, it was a little after midnight on the 25th.

(Record, Vol. III, 108-111)

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CROSS-EXAMINATION

BY MR. BATES:

Q. Now, Mr. Ogburn, just one or two short questions. Did you take any fingerprints?
A. No, sir.
Q. Did you make an effort to take any fingerprints?
A. Yes, sir.
Q. You couldn't get any fingerprints of any kind?
A. No, sir.
Q. Now, Mr. Ogburn, was a search warrant issued at your request, or by your office in connection with the warrant for the arrest of the suspects?
A. Yes.
Q. A search warrant?
A. No, sir, not a search warrant. It was just the warrant for arrest.
Q. And as I understand it, when this warrant was issued, you merely communicated that information to the sheriff in Laramie County—or in Albany County?
A. No, sir, it was the complete state.
Q. Throughout the entire state?
A. The message, yes, sir.
MR. BATES: That's all, and thank you, Mr. Ogburn.

(WHEREUPON, the witness was excused.)

MR. CROW: The state calls Kenneth Lankford.

(WHEREUPON, the witness was sworn by the Clerk of Court.)

TESTIMONY OF KENNETH LANKFORD

Filed September 6, 1968
In United States District Court, Civil No. 5185

DIRECT EXAMINATION

BY MR. CROW:

Q. Will you state your name, please?
A. Kenneth Lankford.
Q. And your official capacity, if any?
MR. BATES: Mr. Crow, we would be happy—if you want us to, we will admit that Mr. Lankford is a duly elected, appointed and qualified acting Deputy Sheriff of Albany County, and was such on November 23rd and 24th, of 1964, and his official duties were in connection with his duties as Deputy Sheriff of Albany County.
Q. Mr. Lankford, on the 24th of November, 1964, did you have an occasion to arrest the defendant in court here today?
A. Yes, sir, I did.
Q. Do you know this defendant?
A. I didn't know him at that time, no.
Q. Is this the man. Calling your attention to the man seated by Mr. Bates at the defense counsel table; is this one of the men you arrested?
A. Yes, sir.
Q. And his name?
A. Harold Whiteley.
Q. Who was the other man that you arrested?
A. The other man was Jack Daley, Jack Oliver Daley.
Q. Mr. Lankford, approximately what time did you arrest Daley and Whiteley?
A. It was approximately 11:00 o'clock p.m., November 24th.
Q. And who was present with you at the time?
A. There were two Laramie police officers, Sergeant Ted Kersting and Petrolman Delbert Rogers.
Q. Was anyone else present?
A. There was another off-duty patrolman with Patrolman Rogers. I do not recall his name at this time.

Q. Was anyone present with Whiteley and Daley?
A. No, sir, they were alone.
Q. Where did you arrest Whiteley and Daley?
A. In the City of Laramie, on Ivinson Avenue between First and Second streets.
Q. Were they driving a car?
A. Yes, sir.
Q. Describe the car?
A. The car was a 1955 Buick, bearing Wyoming license, '64, 2-A96, light blue—or correction, it was light colored on top with a blue bottom.
Q. At the place where you arrested them, what businesses are around there, locally?
A. The car, at the time we arrested them, was facing west on Ivinson Avenue, and on the righthand side or the north side of the street is the Hoppe Hotel. Immediately across the street is the Buckhorn Bar, to the south.
Q. After you had arrested Whiteley and Daley, did you make a search of their automobile?
A. Yes, sir, I did.
Q. What did you find?
A. The search was conducted by myself and Sergeant Kersting. I searched the trunk of the vehicle and in the trunk of the vehicle I found—
MR. BATES: Now, if the Court please, before he testifies to anything he found, I would like to question him on the search and seizure.
THE COURT: All right.
MR. CROW: He wants to question this witness?
THE COURT: On the search.

VOIR DIRE

BY MR. BATES:

Q. As I understand it, you picked up these two individuals pursuant to a request from the Rawlins Sheriff's Office?
A. On the basis of that request, sir, and a Wyoming State item.

Q. That was a state item that was put out by the Carbon County local sheriff's office, state wide?
A. Oh, yes, sir.
Q. Did you have a warrant in your possession at the time that you arrested the two suspects?
A. No, sir, I did not.
Q. Did any of the other officers have a warrant for the arrest of either Daley or Whiteley?
A. No, sir.
Q. Did you have a search warrant to search their automobile at the time that you arrested them?
A. No, sir, I did not.
Q. Did you have a search warrant in your possession at the time that you searched the automobile in question?
A. No, sir, I did not.
Q. Where was Mr. Whiteley at the time that you searched the automobile?
A. Mr. Whiteley was sitting in the patrol car of Patrolman Rogers, immediately behind the 1955 Buick.
Q. Mr. Whiteley was sitting in the patrolman's car?
A. During the search?
Q. Yes?
A. Yes.
Q. And where was the patrolman's car located in relation to the Whiteley automobile that you were searching?
A. Immediately behind it, sir. Oh, I would say there was probably six feet between the two vehicles.
Q. And this search was made during the night time?
A. Yes, sir.
Q. At about 11:00 o'clock at night?
A. Yes, sir.
Q. The articles that you are going to testify to, where did you find those?
A. Well, part of them were found in the trunk of the vehicle.
Q. How did you get into the trunk of the vehicle?
A. With keys from the ignition switch of the vehicle.
Q. Who took the keys out of the ignition switch?
A. Sergeant Kersting, to the best of my memory, sir.

Q. Did he have any discussion with anyone prior to the time that he took the keys?

A. I don't recall, sir.

Q. Then after he took the keys out of the ignition switch, what did he do?

A. He handed them to myself and I opened the trunk.

Q. Now, wait a minute. Now, he handed them to you?

A. Yes, sir.

Q. Did you have any discussion with reference to the keys with any person at that time?

A. No, sir.

Q. Then what did you do?

A. I opened the trunk.

Q. And was the trunk locked?

A. The trunk was shut and locked, sir.

Q. And you opened it with a key. You had to have the key in order to open the trunk?

A. Yes, sir.

Q. Did you discuss with Mr. Whiteley the fact that you were going to search his automobile?

A. No, sir.

Q. Before you took the keys out of the ignition?

A. No, sir, I did not.

Q. Did you have any discussion with Mr. Whiteley as to whether or not it was permissible for you to take the keys and open the back of his car?

A. Not to the best of my recollection, no, sir.

Q. Did you tell Mr. Whiteley what you were looking for?

A. It seems as though we did, but I couldn't swear to that, sir.

Q. Well, he was sitting in the patrolman's car, wasn't he?

A. Yes, sir.

Q. And the patrolman's car was a little distance, wasn't it, from the Whiteley car?

A. A short distance, yes.

Q. How far from the Whiteley car?

A. Oh, I would say not over six feet.

Q. But you didn't after you got the keys out of the —from the man that took them out of the ignition switch, you didn't go to the patrolman's car and say anything to Mr. Whiteley?

A. No. I had a discussion with Mr. Whiteley when he was arrested, not in the patrol car.

Q. Do you know what you were looking for?

A. Yes, sir.

Q. And how did you know what your were looking for?

A. On the basis of Wyoming State item number 881.

Q. You didn't serve any papers of any kind either, a search warrant or a warrant for arrest upon either Mr. Whiteley or Mr. Daley before you arrested them?

A. No, sir, I did not.

Q. When did you tell them that they were under arrest?

A. Immediately upon my arrival at the scene.

Q. Who arrived at the scene first?

A. Patrolman Rogers.

Q. And how much time expired from the time that he got there until you got there?

A. I would say less than a minute.

Q. Where was Whiteley when you arrived at the scene?

A. He was out of his car, both defendants were—excuse me. I shouldn't say, "both defendants." The defendant, Mr. Whiteley was out of his car. Mr. Daley was on one side, and as I recall, Mr. Whiteley was on the other side of the car and leaning up against the fender of the vehicle.

Q. And the officers were shaking them down and feeling of their clothing, their bodies at that time?

A. Yes, sir.

Q. And they were leaning with their hands, as I understand it, up against the car?

A. Yes, sir.

Q. When you drove up to the scene, did you see Whiteley any other place in the street?

A. No, sir.

Q. Do you know whether or not he had been over to the Buckhorn Bar?

A. No, sir.

Q. You didn't see him walk from the Buckhorn Bar back to the car?

A. No, sir.

MR. BATES: That's all.

FURTHER DIRECT EXAMINATION

BY MR. CROW:

Q. Mr. Lankford, did you find anything inside the car proper. Not in the trunk, but in the automobile itself?

A. Yes, sir.

Q. What did you find?

MR. BATES: Now, if the Court please, we would make a motion at this time that no testimony be permitted with reference to any articles found in the car, by virtue of the fact that such articles were obtained or taken by virtue of an illegal search and seizure without a warrant.

THE COURT: You don't intend to argue it here, do you?

MR. CROW: No, sir.

MR. BATES: No, sir.

MR. CROW: Do you want to recess?

THE COURT: Yes. You intend to argue the motion, I presume.

MR. BATES: Now, if the Court please, could we maybe go into other matters with this witness and maybe conclude that phase of it as far as this witness is concerned, and then consider this.

THE COURT: Have you any further questions to ask this witness?

MR. CROW: No, Your Honor, I think this matter should be disposed of now.

THE COURT: May I see counsel at the bench.

(WHEREUPON, a discussion was held off the record.)

THE COURT: It will be necessary for the Court to hear arguments on the motion outside the hearing of the jury; so I will have to have another recess. I will have to caution you again, you are not to talk to anyone, including your fellow jurors, about this case, nor form or express an opinion until you go to the jury room. I will start listening to the arguments, and if you will stay around the courthouse somewhere we will get in touch with you. We might be able to call you back, and if it gets too long, we will dismiss you until tomorrow morning at 9:30. So stick around a little while and I will see how it goes. If you prefer to leave the building and go out for coffee, that's fine. Just don't talk to anybody about the case, and whatever you want, you do, just so you are around here convenient when we need you. Court will be in recess.

(WHEREUPON, at the hour of 3:45 o'clock, p.m., on the 18th day of May, 1965, the Court stood in recess.)

(WHEREUPON, the following proceedings took place in judge's chambers):

MR. CROW: The State would offer to prove by the witness, Kenneth Lankford, if permitted to testify, that after the arrest of Whiteley and Daley, a search of the interior of the automobile in which the defendants were riding, not including the trunk, revealed a loaded pistol and certain old coins, similar to the coins described in State item 881, calling for the arrest of the defendants, and that thereafter a further search of the defendant's automobile, by opening the locked trunk, revealed a valise and tools, alleged to be burglary tools.

MR. BATES: I would object to the introduction of any evidence pertaining to any items taken by Mr. Lankford, Deputy Sheriff of Albany County, Wyoming, out of the Harold Whiteley 1955 Buick Automobile in this case, upon the grounds and for the reason that the search and seizure of the contents of the automobile, the interior of the automobile, the glove compartment or the luggage compartment and I object to any of the contents, etc.,

the interior of the automobile, the glove compartment or the luggage compartment of the automobile, the trunk, for the reason and upon the grounds that the suspects were picked up by Mr. Lankford, Deputy Sheriff of Albany County, and the other arresting officers upon a state-wide release from the Carbon County Sheriff's office of Carbon County, Wyoming. That no consent was asked or received from either Mr. Daley or the defendant in this case for permission of the arresting officers to search the trunk, interior or glove compartment of the Whiteley car. The search was made outside of the presence of the defendant Whiteley, who at the time that the search was made, was sitting in a patrol car located approximately six feet from the Whiteley automobile. That the only items taken by the arresting officers which could be introduced in evidence in this case would be those items upon the persons of the suspects. That the suspects had been arrested, were in the custody of the police officers and in the process of being taken from the place where they were arrested to the Albany County Courthouse and there held to be picked up by the Sheriff of Carbon County, Wyoming, or any of his deputies, and to be transported to Rawlins, Carbon County, Wyoming. That the arresting officers took possession of the automobile at the scene where the men were picked up. The automobile, together with the defendants was being transported to the Albany County Jail to be held and subsequently turned over to the Sheriff of Carbon County, Wyoming. There was no possible chance of the defendants escaping, or leaving, or anyone taking anything out of the automobile; that the officers were actually taking into their possession. That it was incumbent upon the arresting officers to procure a search warrant from the proper magistrate upon proper affidavit for the issuance of a search warrant to authorize and direct them to make a search of the automobile and to take into their possession any items which might have been specified in any search warrant issued.

(Record, Vol. III, 122-134)

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The question the Court will have to decide on this motion is whether the items seized by the officers in Laramie, Wyoming, from the car belonging to the defendant, Whiteley, were the results of a lawful search based on the complaint issued on the robbery of the Rustic Bar on November the 24th, 1964, and the Court will decide that it was; and the further question whether the items so seized could be used in the prosecution of this case and not be confined solely to the prosecution for the defendant for the robbery of the Rustic Bar, and the Court will decide they were. So the motion of the defendant is hereby denied and the defendant is granted an exception.

(WHEREUPON, at the hour of 10:15 o'clock, a.m., on the 19th day of May, 1965, the Court was held in session.)

(WHEREUPON, State's exhibit 9, was marked for identification.)

THE COURT: Court is in session, you may be seated. Sorry the Court was late, but we had to decide some matters this morning and we couldn't do it any sooner. But I think we have got them decided now and things will go faster. You may proceed.

MR. CROW: If the Court please, I would ask that the reporter read the last question asked by the State prior to the objection by counsel for the defense on yesterday's session.

(WHEREUPON, question numbered 24, on page 61 and question numbered 2, on page 62, was read by the reporter.)

(KENNETH LANKFORD, the witness on the stand.)

A. In the car proper was a quantity of personal clothing belonging to both defendants. There was a sack with some dirty underclothing and in it there was another sack, paper sacks, both of these containing a quantity of

toilet articles, personal toilet articles, and in the bottom of the second sack was a pair of men's stockings, grey in color, which were rolled up as if they were neatly rolled up as you would find them in your dresser drawer. In the pair of socks was a quantity of old coins. There was found in the glove box a loaded automatic pistol, P.38, Walther, some liquor and various other papers and what not. At this time I do not recall what they were.

Q. (By Mr. Crow) Now, thereupon, Undersheriff, did you make a further investigation and examination of the automobile?

A. Yes, sir.

Q. Tell the jury what you did?

A. The trunk of the—I took the ignition keys from the vehicle and opened the trunk of the vehicle and there in I found a black valise-type bag containing a quantity of tools, which I felt were burglary tools.

MR. BATES: Now, if the Court please, I would object to the witness drawing any conclusions. I have no objection to his testifying as to what he found.

THE COURT: Objection sustained.

MR. BATES: And ask that the jury be instructed to disregard his conclusion.

THE COURT: The jury will be so instructed.

A. I found a quanity of tools laying alongside the black valise bag on the floorboards of the trunk. I found a carpenter's crowbar about, oh, two, two and a half feet long, and these I removed from the trunk and placed in my patrol car.

Q. All of the items that you removed from the automobile in which the defendants were arrested, was taken by you to your patrol car, is that right?

A. Everything but the—to the best of my recollection, everything with the exception of the revolver, which Sergeant Kersting of the Laramie Police Department retained in his possession until we got to the sheriff's office.

Q. Was this property delivered to the Sheriff of Carbon County?

A. It was.

Q. And was it all delivered to him?

A. It was all delivered to him.

Q. Handing you what has been marked for purposes of identification as State's exhibit numbered 9; I ask you what this is?

A. This is the black valise bag that I removed from the trunk of the automobile.

Q. Does the tag on the bag bear your initials or other mark?

A. Yes, it does.

Q. Was that mark or initial placed on the bag by yourself?

A. Yes, sir.

Q. Attached to the bag?

A. Yes, sir.

Q. Calling your attention to the interior of the bag; I ask you whether you know what the items are inside the bag?

A. Well, everything with the exception of the two envelopes, I do not recognize.

Q. If you will hand me the two envelopes, please. The items that are now in the bag are the same items that were in the bag when you made the arrest of this defendant.

A. No, sir. The saw blade was not in the bag.

Q. Where was the saw blade?

A. The saw blade was under the rear seat of the vehicle; and the bottle of 7-UP in here was not in the bag, sir.

(WHEREUPON, State's exhibit 10, was marked for identification.)

Q. Were all of the other items that are now in the bag, in the bag at the time you made the arrest?

A. I would say so, sir.

Q. Handing you what has been marked for purposes of identification as State's exhibit numbered 10; I ask you what that is?

A. This is a saw blade, a carpenter's saw blade, or I would determine it as such, which was removed from under the rear seat of the vehicle.

(WHEREUPON, State's exhibit 11, was marked for identification.)

Q. Calling to your attention to what has been marked for purposes of identification as State's exhibit numbered 11; I ask you what that exhibit is?

A. This exhibit is a quanity of tools which are very similar—

MR. BATES: Now, if the Court please—I have no objection to the witness identifying those tools and if he wants to take each individual item and say what they were; but I think they speak for themselves.

Q. Well, Mr. Lankford, you have seen me remove the tools from the black bag?

A. Yes, sir.

Q. Will you so testify?

A. Yes, sir.

Q. Now, Mr. Lankford, calling your attention to what has been marked

(WHEREUPON, State's exhibit number 12, was marked for identification.)

(continuing) for purposes of identification, State's exhibit 12; I hand you that exhibit and ask you what it is, if you know?

A. This is the pair of men's stockings that was removed from the interior of the vehicle that was in the paper sack that I have previously testified to.

Q. Does the tag on the pair of socks bear your initial?

A. Yes, sir.

Q. And was that tag placed on the pair of socks by yourself?

A. Yes, sir.

Q. And initialed by you?

A. Yes, sir.

(WHEREUPON, State's exhibit 13, was marked for identification.)

Q. Calling your attention to what has been marked for purposes of identification as State's exhibit number 13; I ask you what that is, if you know?

A. This is the P.38 automatic pistol recovered from the glove compartment of the automobile.

Q. Does the tag on the pistol bear your initial?
A. Yes, sir.
Q. Was the tag placed on the pistol by yourself?
A. Yes, sir.
Q. And initialed by you?
A. Yes, sir.

(WHEREUPON, State's exhibit 14, was marked for identification.)

Q. Handing you what has been marked for purposes of identification as State's exhibit numbered 14, Mr. Undersheriff; I ask you what this is?
A. This is the carpenter's crowbar which was laying alongside the black valise in the trunk of the automobile there that I have previously mentioned.

(WHEREUPON, State's exhibit number 15, was marked for identification.)

Q. Now, handing you what is marked for purpose of identification as State's exhibit number 15; I ask you what this is?
A. This is a six pound sledge hammer which was inside the black valise bag at the time I removed it from the vehicle.
Q. Were there any more tools, if you know, in the black bag or in the automobile which have not been marked for purposes of identification?
A. Well, it seemed to me as though there were some chisels, but I don't recall seeing—there was also a ball-peen hammer, smaller in size than the sledge hammer.
Q. Now, Mr. Undersheriff, was each of the items which has been marked for purposes of identification as State's exhibits 9 through 15, delivered by you to the Sheriff of Carbon County on the 24th day of November, 1964?
A. No, sir, I didn't deliver those tools to him.
Q. To whom did you deliver them to?
A. I delivered the tools to the Sheriff in Albany County and they were in turn turned over to Sheriff Ogburn early in the morning.

Q. Now, Mr. Lankford, were all of the tools that were in the black valise, marked for purposes of identification as State's exhibit numbered 9, were all of those tools delivered also in the bag by the sheriff's office from Albany County to Sheriff C. W. Ogburn?

A. Yes, sir.

MR. BATES: Now, if the Court please, first I'd like to ask him—may I ask him one question?

THE COURT: Yes.

VOIR DIRE

BY MR. BATES:

Q. Do you know of your own personal knowledge that all the tools were delivered to C. W. Ogburn, of your own personal knowledge?

A. No, sir, I do not.

FURTHER DIRECT EXAMINATION

BY MR. CROW:

Q. Where did you take the black bag, Mr. Lankford?

A. I took the black bag—we have an evidence locker which contains various compartments assigned to various cases. All the evidence that was removed from the vehicle was stored in the locked evidence locker; and upon my return to work the following morning at 8:00 o'clock they were gone. I don't know how to answer the balance of that, sir.

Q. Do you know where they had gone?

A. Only from what I have been told.

Q. And where had they gone?

MR. BATES: Now, if the Court please, he's asking the witness if he—it is strictly hearsay and I would object to it, unless he knows of his own knowledge.

THE COURT: Objection sustained.

MR. CROW: You may cross-examine.

CROSS-EXAMINATION

BY MR. BATES:

Q. Just a few questions, Mr. Lankford, and we will make it pretty rapid-fire. Now, you don't know who put these items that you took out of the car, into the car?

A. No, I do not.

Q. Do you know who owned the car?

A. I know who the car is purported to be registered to, sir.

Q. But you don't know of your own knowledge who owns the car?

A. No, sir.

Q. Do you know who owns this black valise bag that has been marked for purposes of identification as State's exhibit numbered 9?

A. No, sir.

Q. You wouldn't know where the tools—any of the tools came from?

A. No, sir.

Q. And you wouldn't know who put the coins into the sock?

A. No, sir.

Q. And you wouldn't know who put the the tools into the car?

A. No.

Q. And you wouldn't know who put the tools into the bag?

A. No, sir.

Q. Do you know who the owner of the pistol was?

A. No, sir.

Q. Did you try to determine, or did you check in any manner to determine who the owner of the pistol was?

A. Certainly did.

Q. Were you able to do so?

A. No, sir.

Q. Now, just generally, what items were taken out of the car, the interior of the car?

A. Everything that was contained therein was removed from the vehicle.

Q. And I want to know if you remember just what—specifically what items were taken out of the interior of the car—not the trunk now?

A. Not the trunk. All right, sir. To the best of my memory, it was the loaded pistol, all the personal clothing, the two paper sacks, one containing dirty clothes and the other the coins and toilet articles, the saw blade and a partially empty bottle of liquor, a quart bottle of 7-UP, and that's all I remember right now, sir.

Q. All right. Now, all the rest of the stuff, all the other exhibits were taken out of the trunk of the car or out of the black bag in the trunk of the car?

A. Yes, sir.

Q. And these are the only items that you mentioned that were taken out of the interior of the car?

A. To the best of my memory it is, sir.

MR. BATES: That's all, Mr. Lankford, and thank you.

(WHEREUPON, the witness was excused.)

MR. CROW: The State calls Officer Rogers.

(WHEREUPON, the witness was sworn by the Clerk of Court.)

TESTIMONY OF DELBERT C. ROGERS

Filed September 6, 1968
In United States District Court, Civil No. 5185

DIRECT EXAMINATION

BY MR. CROW:

Q. State your full name, please?

A. Delbert C. Rogers.

Q. And you official duties, if any?

MR. BATES: Now, if the Court please, we would be most happy to admit that Patrolman Rogers is a patrolman duly employed by the City of Laramie, Albany County, Wyoming, and that he was such during

the month of November, 1964—and still are, aren't you Mr. Rogers?

THE WITNESS: Yes, sir.

MR. BATES: And his official duties in connection with his capacity as a police officer.

THE COURT: All right.

Q. (By Mr. Crow): Mr. Rogers, on the 24th of November, 1964, did you have occasion to see this defendant, Harold Whiteley?

A. I did.

Q. Where did you see him?

A. I first noticed him in the 200 block of North Cedar in the City of Laramie.

Q. Where is North Cedar in the City of Laramie?

A. Its on the west side of the railroad tracks, it is highway 130-230.

Q. What called you attention to the defendant, if anything?

A. I received a description of a vehicle that he was supposed to be driving.

Q. Had you received anything other than a description?

A. Not of the vehicle, no. Partial license plate number was all.

Q. And how about the defendant or the people driving the automobile?

A. I had their names and I personally knew one of them that was in the vehicle.

Q. How did you receive this information?

A. It was typewritten notes on the bulletin board at the police station.

Q. Did the information identify the sender who had sent the message?

A. Yes, sir, it did.

Q. Who was the sender?

A. It was, "Authority, Sheriff's office, Rawlins."

Q. Where did you next see the defendant after you saw him on Cedar Street in the City of Laramie?

A. I followed him back over the Clarke Street viaduct to the 100 block of Ivinson where he got out of the vehicle there.

Q. What did you do then?

A. I stopped him.

Q. Did you identify him as being one of the persons in your communication from the sheriff's office at Rawlins?

A. I asked him his name at this time, and he gave me a name that I don't remember, but it was not "Whiteley."

Q. Was he alone in the automobile at that time?

A. No, he was not.

Q. Who was with him, if you know?

A. Jack Daley was with him.

Q. Did you know Jack Daley at the time.

A. I do. I knew him at the time, yes.

Q. What did you do then?

A. I placed Mr. Whiteley on the front fender of the patrol car and I had with me an off-duty police officer which was watching Mr. Whiteley while I removed Mr. Daley from the vehicle parked at the curb.

Q. And what did you do then?

A. I brought Mr. Daley back to the patrol car and placed him on the right fender of the patrol car and then I returned back to the left side where I could watch Mr. Whiteley.

Q. Were you alone all this time with the other off-duty patrolman?

A. I was up to this time, yes.

Q. What happened then?

A. At this time Undersheriff Lankford and Sergeant Kersting arrived almost together. Undersheriff Lankford driving up from the east, Sergeant Kersting driving up from the west end of Ivinson there.

Q. Were you present when a search was made of the automobile in which the defendant was riding?

A. I was.

Q. Who conducted that search?

A. Sergeant Kersting and Undersheriff Lankford.

(Record, Vol. III, 137-150)

OPINION OF UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Filed November 25, 1968

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

-o-

No. 5185 Civil

HAROLD WHITELEY, No. 9789, an inmate of the Wyoming State Penitentiary, Rawlins, Wyoming,
PETITIONER

vs.

STATE OF WYOMING, RESPONDENT

JUDGE'S MEMORANDUM

This is a habeas corpus proceeding brought by petitioner, Harold Whiteley, in which he asserts that he is unlawfully held in custody in the Wyoming State Penitentiary, located in the City of Rawlins, County of Carbon, State of Wyoming.

The parties stipulated the record to be filed with this court, namely, the original record of the trial court and the record on appeal to the Wyoming Supreme Court.

At the hearing on September 6, 1968, in this court, petitioner was represented by his attorneys and the respondent was represented by the Office of the Attorney General of the State of Wyoming. The Court heard oral arguments of both counsel and studied their briefs and authorities.

Petitioner was tried in the District Court, Second Judicial District, Carbon County, Wyoming, for the crime of breaking and entering a locked building. The jury returned a verdict of guilty and answered in the affirmative the three interrogatories concerning the three prior felonies. Petitioner was sentenced to the Wyoming State Penitentiary for a term of not less than one nor more

than ten years and committed for the remainder of his natural life for being a person judicially determined of being an habitual criminal. The trial Court ordered said terms of sentences to run concurrently. At the arraignment, trial and sentencing, petitioner was duly represented by court appointed counsel.

On appeal to the Wyoming Supreme Court, each and every argument presented by petitioner's counsel was considered and in a unanimous opinion the Supreme Court, duly constituted, found no reversible error and affirmed the judgment of the trial court. Whiteley v. The State of Wyoming, Wyo. 1966, 418 P.2d 164. The Supreme Court found that there was no error in amending the information in a matter of substance without obtaining leave of court, and that the defendant, Harold Whiteley, had been arraigned on the amended information and no error existed as to that aspect of the case. The Supreme Court held, also, that there was no abuse of discretion by the trial judge in allowing a witness to testify contrary to the court's prior order excluding witnesses, and that there was no showing of any constructive fraud having been perpetrated upon the trial court by the actions of the county attorney. The Supreme Court found that the arrest of petitioner was reasonable and proper, and stated that the search of his automobile was justified.

On January 4, 1967, petitioner filed an application for post-conviction relief pursuant to Wyoming law, in the District Court, Second Judicial District, Rawlins, Wyoming. Section 7-408.1 through 7-408.8, W.S. 1957 as amended. In that application petitioner raised three new issues and repeated the claim pertaining to the alleged unlawful search and seizure and subsequent admission into evidence of the items obtained through the search and seizure. The three new grounds for relief in the post-conviction proceedings were: (1) that petitioner was denied his right to a fair and impartial trial by jury and the right not to be twice put in jeopardy for the same offense insofar as the jury had knowledge of his prior criminal record which was alleged in the information and in turn read to the jury; (2) that petitioner

was denied his constitutional right of effective assistance of counsel because of certain alleged failures on the part of petitioner's appointed trial counsel; and (3) that petitioner was twice placed in jeopardy and denied due process and equal protection of the law wherein he was sentenced to two concurrent sentences for the commission of a single crime.

After hearing petitioner's application for post-conviction relief, receiving evidence, and considering the oral arguments and briefs of petitioner's counsel and opposing counsel, the District Court found against the petitioner on all points raised in his application for post-conviction relief. Petitioner took no appeal to the Wyoming Supreme Court from the trial court's order denying post-conviction relief.

Petitioner did not exhaust his state court remedies with respect to the three new claims raised in the post-conviction proceedings: they have not been considered or determined by the Wyoming Supreme Court. Direct appeal is expressly provided by the Wyoming Post-Conviction Relief statute. Sec. 7-408.7 W.S. 1957. Petitioner cannot be heard to say, therefore, that an appeal from the post-conviction order would be repetitious or futile. Petitioner is no stranger to the right of review by the Supreme Court nor to the procedure for perfecting an appeal. Habeas corpus proceedings in the United States District Court are improper substitutes for state appellate procedure available to state prisoners.

On November 21, 1967, petitioner filed his petition for a writ of habeas corpus with this court. The motion to dismiss filed by the State of Wyoming was heard and denied. Thereafter, in petitioner's amended petition he alleged the following grounds on which he claimed the right to relief: (1) that he was denied his right to counsel and due process of law under the federal constitution when the court imposed the sentence upon petitioner under the Habitual Criminal Act without obtaining evidence that his right to representation by counsel was adequately protected in the proceedings resulting in the prior felony convictions on which the habitual criminal penalty was based. This issue is raised for the first time

and has not been presented to any state court for consideration. (2) That petitioner was denied his federal constitutional guarantees in that he was twice placed in jeopardy for the same offense and was denied due process and equal protection of law when he was given one penalty for the crime of breaking and entering and an additional penalty for being an habitual criminal. This issue was decided against petitioner in the post-conviction proceeding. (3) That petitioner's arrest was illegal for want of a valid complaint and valid arrest warrant; that the search of his automobile was not made incident to a lawful arrest and that the subsequent seizure of evidence was invalid; and that the introduction of the illegally seized contraband obtained in the unlawful search and seizure at his trial was prejudicial and in violation of the federal constitution. This issue has been decided by both the trial court in the post-conviction proceedings and by the Wyoming Supreme Court.

The stipulated record shows beyond cavil that the petitioner has not exhausted his state remedies as to the first ground on which he bases his claim for relief, and that his petition for writ of habeas corpus is in effect an appeal from the State District Court's order in the post-conviction proceeding as to the second ground, and an appeal from the Wyoming Supreme Court as to the third ground on which he claims relief. The petition for writ of habeas corpus, is, therefore, without merit.

The record shows that the Supreme Court of the State of Wyoming, in a unanimous opinion, clearly and conclusively passed upon each and every matter raised by petitioner in his appeal to that court. The judgment of a state court is ordinarily res judicata, not only of those issues which were raised and determined, but also of those issues which might have been raised.

The writ of habeas corpus may not be used as an appeal or writ of error to review proceedings in the state court. Woolsey v. Best, 299 U.S. 1; Moore v. Dempsey, 261 U.S. 86; Alexander v. Daugherty, 189 F.Supp. 956, aff'd 10 Cir., 286 F.2d 645, cert. den. 366 U.S. 939. The Wyoming State Supreme Court is competent to consider and determine the matters before it and I am reluctant to invade the sovereign jurisdiction of that court.

Petitioner improperly asserts a new claim in this court to the effect that his constitutional rights were abridged by the trial court for the reason that it did not obtain evidence that petitioner was represented by counsel in the proceedings which resulted in the prior felony convictions on which the habitual criminal charge was based. Failure to raise any claim of substantial denial of constitutional rights in the trial, on appeal, or in the post-conviction proceedings constitutes a waiver of such claim. Section 7-408.3 W.S. 1957 as amended; Alexander v. Daugherty, supra. There is no evidence that petitioner's failure to raise the new issue in any of prior proceedings was due to ignorance, duress or any other reason for which petitioner could not be held responsible.

Lest petitioner ultimately complain that there was such a gross violation of his constitutional rights as to deny him the substance of a fair trial and thus oust the court of jurisdiction to impose sentence, I shall briefly comment on the following claims which have not been adjudicated by the Wyoming Supreme Court. Contrary to petitioner's first claim in the post-conviction proceeding, he was not denied the right to a fair and impartial trial by jury and the right not to be twice put in jeopardy for the same offense by reason of the amended information which recited three prior felony convictions and sentences nor by reason of the reading thereof to the jury. The jury was not asked to, nor did it try and determine petitioner's innocence or guilt of those prior felonies. The role of the jury in this respect, clearly explained and delineated by the trial judge in his instructions,[1] was mere-

[1] Instruction No. 10 given by the trial court reads in part as follows: "With reference to Counts 2, 3, and 4 of the Information the State must prove beyond a reasonable doubt that the defendant; Harold Whiteley, who the State has charged in Count 1 of the Information is the one and same person that the State charges with having been convicted of the crimes charged in Counts 2, 3, and 4 of the Information. You should consider the evidence on each of the alleged prior convictions individually. You will be asked to determine the number of times the defendant has been previously convicted of felonies, as alleged in the Information, if any, and so state in your verdict."

ly to determine the number of times, if any, the petitioner had previously been convicted of felonies as alleged in the information.

On the trial of the breaking and entering charge against petitioner, he was interrogated by his own counsel concerning past felony charges that had been made against him. He stated unequivocally that he had plead guilty to all of them. On direct examination by his counsel, petitioner testified that he had been in the penitentiary at Leavenworth, Kansas, and that he had served six sentences in penitentiaries. At no time did he complain that his right to representation by counsel had not been adequately protected in the proceedings resulting in the prior felony convictions on which the habitual criminal charge was based. The convictions on which the habitual criminal charge was based occurred on February 24, 1942, April 13, 1956, and November 17, 1959. Petitioner's counsel objected to the introduction in evidence of the certified copies of the judgment and sentence in those prior proceedings on the general grounds that they were incompetent, irrelevant, immaterial and prejudicial and on the ground that they were offered without sufficient foundation; counsel did not claim that petitioner had not been represented by counsel in the proceedings which resulted in the prior convictions. The record contains no evidence from which it could be inferred that petitioner was denied his constitutional rights of counsel at the time of his prior felony sentences. In the absence of evidence to the contrary, it must be presumed that the acts of the sentencing courts which heard the 1942, 1956 and 1959 charges, were proper and that the constitutional rights of petitioner were adequately protected during those proceedings. Likewise, in the absence of specific objections made at the proper and opportune time during the trial, petitioner cannot raise the new objections for the first time in the United States District Court in a habeas corpus proceeding. For the foregoing reasons, petitioner is not entitled to a writ of habeas corpus on the first ground alleged in his petition.

The substance of petitioner's second ground for relief in this court (also raised in he post-conviction proceeding), is that the trial judg referred to the habitual criminal aspects of the judgm nt and sentence as a separate crime. At the time of s ntencing on June 1, 1965, in the colloquy between the court and petitioner and petitioner's counsel, the Cou said, "And, of course, all of these three counts, original harges and the other three counts taken together consti tes the crimes of being a habitual criminal". The Cou then said, "* * * it will be the sentence of the Court hat you shall spend a term in the State Penitentiary of not less than your natural life".

The formal judgment and sentence of the Court filed on June 1, 1965, however, emonstrate that the Court was well aware that the nalty is enhanced by the Habitual Criminal Act. Aft reciting that the defendant had been found guilty of t crime of breaking into a locked and sealed building, nd also having been found to be the one and same pers who had prior hereto been convicted three times of felo es under the habitual criminal act of the State of W ming * * *", the Court ordered, adjudged and decreed hat petitioner be imprisoned and confined in the Wyomi State Penitentiary "for a term of not less than 1 yea nor more than 10 years, on the first count charging (s in the Information, towit: Breaking into a Locked or ealed Building, and for the remainder of your natura life under the charge and allegations laid under and conformity with the Habitual Criminal Act set forth the Information filed herein, all of said terms of se tence to run concurrently at hard labor". Whereupon trial judge commanded the warden of the State Peni tiary to keep and imprison petitioner in the penitentia "for a term of not less than 1 nor more than 10 year on the first count; and for the remainder of his na al life under the Habitual Criminal Act of the State f Wyoming, all to run concurrently".

The record does not su rt petitioner's claim that he was sentenced to two con rrent sentences for the commission of a single crim or that he was given one

penalty for the crime of breaking and entering and another penatly for being an habitual criminal. The requirements of the Wyoming Statutes were followed with respect to the habitual criminal charge against petitioner: the previous convictions were set forth in the Information, and proof thereof was made in the trial. Section 6-11, W.S. 1957. Upon proof that petitioner had been convicted of a felony three times previous to the conviction about which he now complains, the trial court properly enhanced petitioner's punishment by imprisonment in the state penitentiary for not less than life. Section 6-10, W.S. 1957. The judgment and sentence of the trial court filed June 1, 1965, was proper and did not violate petitioner's constitutional rights. He is, accordingly, not entitled to a writ of habeas corpus based on his second ground.

In his petition for a writ of habeas corpus, petitioner has alleged grounds for relief under the Federal Constitution. It is the duty of this Court "to make an independent determination that due process has been observed in the factual and legal support for state adjudication". Maes v. Patterson, 10 Cir., —— F.2d —— (October 2, 1968); Dentis v. Oklahoma, 10 Cir., 376 F.2d 590 (1967). I advert, therefore, to petitioner's claim that his arrest was illegal for want of a valid complaint and valid arrest warrant; that the search of his automobile was not made incident to a lawful arrest and subsequent seizure of evidence was invalid; and that the introduction of the illegally seized contraband obtained in the illegal search and seizure at petitioner's trial was prejudicial in violation of the federal constitutional provisions. The Supreme Court of Wyoming, as I have already said, made a full and final determination of this issue and upheld the validity of the arrest and seizure.

The material facts with respect to the arrest, search and seizure are these: on the evening of November 23, 1964, several business establishments in Saratoga, Carbon County, Wyoming, were broken into. On November 24, 1964, the Sheriff of Carbon County investigated the offenses. Acting upon a "tip", the Sheriff signed a complaint charging petitioner and one other with breaking

and entering a locked and sealed building. The complaint was made to the Justice of the Peace and a warrant of arrest was issued. A radio broadcast, Item 881, was made that same day, and was received by the Sheriff's Office in Laramie, Albany County, Wyoming, and communicated to the Laramie Police Department on November 24, 1964. Late that night, the Laramie Police stopped and detained petitioner in Laramie, Wyoming, and almost simultaneously he was arrested by the deputy sheriff of Albany County, Wyoming. The Laramie police and the deputy sheriff had neither an arrest warrant nor a search warrant. They searched petitioner's automobile without his consent, and removed several items of personal property which were later introduced into evidence at the trial. The Laramie police acted in reliance upon the information furnished in the notice posted in the Laramie Police Department which was authorized by Item 881 sent out by the Carbon County Sheriff; the deputy sheriff of Albany County acted in reliance upon Item 881. Thus, the officers were acting on reliable information which caused them to believe that Whiteley had committed a felony.

It may be said that the information received by the Laramie police officers and the Albany County Sheriff's office was hearsay as to them. Such information, however, came from an official source, specifically provided and customarily used to transmit such information. The Sheriff's office and the Police officers were not entitled to discredit the information thus released and transmitted. Had they not pursued Item 881 and the police department notice, they would have been derelict in their duties. The Police officers who stopped and detained petitioner, and the deputy sheriff who made the arrest and searched petitioner's automobile were acting on trustworthy information which warranted them, as reasonably prudent men, to believe that an offense had been or was being committed.

I find, under the facts and circumstances in the case before me, that the police officers and the deputy sheriff had probable cause to believe that at the time they detained and arrested him, the petitioner had violated the

law of the State of Wyoming related to breaking and entering a locked or sealed building. It follows that the arrest was lawful and that the subsequent search and seizure were made incident to that lawful arrest and were valid. The contraband seized was, therefore, competent evidence lawfully received at the trial of petitioner. Petitioner's third claim for relief does not entitle him to a writ of habeas corpus.

The petition for writ of habeas corpus is, therefore, denied.

This memorandum sufficiently states the findings of fact and conclusions of law and no additional findings are necessary.

Dated this 25th day of November, 1968.

EWING T. KERR
Judge

JUDGMENT

Filed November 25, 1968

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

No. 5185 Civil

HAROLD WHITELEY, No. 9789, an inmate of the Wyoming State Penitentiary, Rawlins, Wyoming,
PETITIONER

—*vs*—

STATE OF WYOMING, RESPONDENT

JUDGMENT

The above-entitled matter having come on regularly for hearing before this Court, petitioner, Harold Whiteley, being represented by his attorneys William J. Knudsen, Jr., and the Wyoming Defenders Aid Program, by and through its student interns, and respondent, the State of Wyoming, being represented by the office of the Attorney General of the State of Wyoming, Jack Speight, Assistant Attorney General, and the Court having before it the stipulated record of prior state court proceedings, and having heard oral arguments of counsel on behalf of petitoner and on behalf of the respondent, took the matter under advisement; and having considered the pleadings and the stipulated record consisting of the original court file, with exhibits, of the Second Judicial District, State of Wyoming, Docket No. 2885, and the original record on appeal in the Wyoming Supreme Court, Docket No. 3461, and having examined the briefs and authorities submitted by counsel in support of their theories of the case, the Court prepared and filed its memorandum opinion finding that the petitioner is not entitled to a writ of habeas corpus, and treated said memorandum opinion as constituting the Findings of Fact and Conclu-

sions of Law of this case, and being fully advised in the premises, it is

ORDERED that the petition of Harold Whiteley for writ of habeas corpus, be, and the same is hereby, denied, each party to pay its own costs.

Dated this 25th day of November, 1968.

EWING T. KERR
Judge

OPINION OF COURT OF APPEALS
FOR THE TENTH CIRCUIT

Filed September 30, 1969

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

SEPTEMBER—1969

No. 39-69

HAROLD WHITELEY, APPELLANT

v.

LENARD MEACHAM, Warden
Wyoming State Penitentiary, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

WILLIAM J. KNUDSEN, JR., Wyoming Defender Aid Program, University of Wyoming, Laramie, Wyoming, for appellant.

JACK SPEIGHT, Assistant Attorney General, Cheyenne, Wyoming (JAMES E. BARRETT, Attorney General, Cheyenne, Wyoming, with him on the brief) for appellee.

Before PHILLIPS, LEWIS and HICKEY, Circuit Judges

HICKEY, Circuit Judge

Petitioner Whiteley sought a writ of habeas corpus pursuant to 28 U.S.C. § 2254 against the State of Wyoming charging it had unconstitutionally incarcerated him. At the time of oral argument the court permitted the substitution of Lenard A. Meacham, Warden of the State Penitentiary for the State of Wyoming as the proper respondent appellee.

The trial court determined the issues presented on an original and amended petition and denied the application. This is an appeal from that action.

Petitioner presents for review the following issues:

1. The trial court's determination that petitioner had not exhausted his state remedies before filing in the United States District Court was error;

2. The constitutional issues adversely decided by the state court were erroneuosly adopted as res judicata in the federal habeas proceedings by the trial court;

3. Petitioner's failure to object to the introduction in evidence of a 1942 judgment and sentence as evidence or prior conviction on an habitual criminal charge does not preclude the consideration by this court;

4. The introduction in evidence of the 1942 judgment and sentence on the charge of recidivism for the purpose of enhancing the guilt of petitioner was prejudicial error;

5. The sentence imposed on petitioner for the commission of the offense of larceny and as an habitual criminal constitutes two sentences for a single crime;

6. Petitioner's arrest in Laramie, Wyoming, by a Laramie police officer, was illegal and the search and seizure incident thereto was thereby tainted, thus making the admission of the fruits of that search as evidence at petitioner's trial, on the charge of burglary in 1965, prejudicial error.

Neither the record on appeal nor the briefs question the factual determination made by the Supreme Court of the State of Wyoming in its consideration of a direct appeal on the questioned 1965 conviction.

Title 28 U.S.C. § 2254 unmistakeably provides that the factual issues determined by the state court shall be presumed to be correct.[1]

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[1] § 2254(d) provides: "In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be

The foregoing directs us to accept the following as salient facts:

> "On November 23, 1964, certain business establishments in Saratoga, were broken into, including the Rustic Bar and Shively's Hardware, the offenses being investigated by the Carbon County Sheriff, who, acting on a tip, the next day signed a complaint

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presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding:

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous."

charging defendant and another with breaking and entering the building indentified as the Rustic Bar. This complaint was made before a justice of the peace at approximately 11:30 a.m. on the 24th, and a warrant issued. After the investigation, the sheriff put out a state item on the radio to pick up two suspects of the breaking and entering, defendant and another. The message went to the network at Casper and was transmitted over the State, received by the Albany County Sheriff's Office and communicated to the Laramie Police Department, the message giving names and descriptions of the two persons and advising the type of car probably being driven and amount of money taken, including certain old coins with the dates. Late at night on November 24, a Laramie patrolman, in reliance on the information in the radio item, arrested the defendant and his companion. At the time, the patrolman had no warrant for defendant's arrest nor search warrant. The officer together with a deputy sheriff, who had come up in the meantime, searched the car and removed a number of items introduced in evidence, including tools and old coins, identified at the trial as taken from Shively's Hardware. On the next morning, defendant was taken to Rawlins and a new complaint and warrant were issued for the breaking and entering of the hardware store and defendant was bound over and later tried." Whiteley v. State, 418 P.2d 164, 165-166 (Wyo. 1966).

28 U.S.C. § 2254(c) provides:

"An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

The trial court found:

"Petitioner did not exhaust his state court remedies with respect to the three new claims raised in the post-conviction proceedings; they have not been con-

sidered or determined by the Wyoming Supreme Court. Direct appeal is expressly provided by the Wyoming Post-Conviction Relief statute. Sec. 7-408.7 W.S. 1957. Petitioner cannot be heard to say, therefore, that an appeal from the post-conviction order would be repetitious or futile. Petitioner is no stranger to the right of review by the Supreme Court nor to the procedure for perfecting an appeal. Habeas corpus proceedings in the United States District Court are improper substitutes for state appellate procedure available to state prisoners." Whiteley v. Wyoming, 293 F. Supp. 381, 383-384 (D. Wyo. 1968).

Additionally, it is evident that the question of whether or not a petitioner has exhausted remedies available in the state court is a question of law and not of fact. Rose v. Dickson, 327 F.2d 27 (9th Cir. 1964).

In addition to the appellate procedure noted by the trial court, Article 5, § 3 of the Wyoming constitution establishes original jurisdiction in the Wyoming Supreme Court to issue writs of habeas corpus. Therefore, we cannot find error in the trial court's determination that petitioner had not exhausted his available remedies in the state court. We are taught that a state prisoner seeking federal habeas corpus relief in a federal court who asserts several errors will only receive consideration from the federal court on those which the state's highest court has considered. Watson v. Patterson, 358 F.2d 297 (10th Cir.), *cert. denied*, 385 U.S. 876 (1966).

Whiteley's argument that the Wyoming Supreme Court will not generally hear such petitions is not persuasive because the "[p]robability of success is not the test for determining the adequacy of state remedies. The fact that the issue may be determined contrary to [the petitioner] does not establish any ground for questioning the adequacy or effectiveness of the remedy provided for the presentation and determination of that issue." Boyd v. Oklahoma, 375 F.2d 481, 482 (10th Cir. 1967). " 'Ineffectiveness' of state relief cannot be established if no attempt is made to obtain that relief." Morehead v. California, 339 F.2d 170, 171 (9th Cir. 1964).

The foregoing directs that Whiteley seek determination of his issues 3, 4 and 5 in the state courts. While it is true that post-conviction relief was sought in the state trial court, an appeal from the ruling of that court was not taken to the Supreme Court of Wyoming. The federal trial court, conversant with all the facts, concluded that Whiteley was no stranger to the right of review by the Supreme Court nor to the procedure for effecting an appeal. The record bears this out. The provision in the Wyoming constitution authorizing original jurisdiction for writs of habeas corpus assures an additional avenue for relief.

We agree with the trial court's conclusion that "[t]he Wyoming State Supreme Court is competent to consider and determine the matters before it and I am reluctant to invade the sovereign jurisdiction of that court." *Whiteley, supra* at 384.

In view of the foregoing, we turn to the question determined by the Wyoming State Supreme Court in Whiteley v. State, *supra*, of whether "[t]he court admitted into evidence certain items of property obtained by an unlawful search of defendant's automobile," which is the only question available to us for review.

It is evident from the facts that several crimes had been committed in Saratoga, Wyoming, including the breaking and entering of the Rustic Bar and Shively Hardware. The Carbon County Sheriff investigated the burglaries. He signed a complaint charging Whiteley and another with breaking and entering the building identified as the Rustic Bar. Immediately thereafter the sheriff issued an item on the state radio to pick up two suspects, Whiteley being identified as one of the suspects. This information was transmitted over the state and received by the officers in Laramie, Albany County, Wyoming, which is contiguous to the county wherein the crime was committed. The Supreme Court determined from these facts that the arrest made by the officer of the Laramie Police Department was a warrantless arrest. The Supreme Court said:

"It has long been settled in this jurisdiction that 'a peace officer may arrest, without a warrant, one whom he has reasonable or probable grounds to suspect of having committed the felony.' State v. George, 32 Wyo. 223, 231 P. 683, 690." *Whiteley*, supra at 167.

The immediate search at the time of arrest by the Albany County under-sheriff discovered the evidence which was introduced at a subsequent trial charging the breaking and entering of Shively Hardware. The record reflects that after the sheriff of Carbon County had been notified of the arrest on November 24, 1964, he transported Whiteley from Laramie to Rawlins on November 25, 1964, and thereafter, on November 25, 1964, filed a complaint and obtained a warrant on the Shively Hardware robbery.

Wyo. Stat. § 7-173 (1957) provides:

"If upon the whole examination, it appears that there has been no offense committed, or that there is not probable cause for holding the prisoner to answer the offense, he shall be discharged."

It is apparent that one arrested in Wyoming is brought before a Justice of the Peace for immediate examination wherein the question of probable cause is determined. The facts recited by the Supreme Court establish that "[o]n the next morning, defendant was taken to Rawlins and a new complaint and warrant were issued for the breaking and entering of the hardware store and defendant was bound over and later tried." *Whiteley*, *supra* at 166. Thus, the probable cause for detention was established at the preliminary hearing, and at the trial of the case, and by the Supreme Court of the State of Wyoming.

The offense charged in the complaint and warrant questioned was for breaking and entering the Rustic Bar. The preliminary hearing and information upon which Whiteley was convicted charged breaking and entry of Shively Hardware.

The argument of counsel for Whiteley overlooks the determination of the Supreme Court that the arrest was warrantless and relies upon the fact that a complaint and warrant were issued prior to the apprehension charging Whiteley with a different crime than the one upon which he was finally prosecuted. Whiteley's contention that the arrest was illegal because he was identified by an unnamed informer not shown in the complain upon which the warrant was issued has been answered by the Supreme Court of the United States. McCray v. Illinois, 386 U.S. 300, 311 (1967). At the time of a warrantless arrest, the question of probable cause is determined by the arresting officer rather than a judicial officer. Under the facts recited, it is evident that the Laramie officers relied upon the state police bulletin issued by the sheriff of Carbon County, known to them to be reliable, and therefore the Supreme Court found the warrantless arrest to be lawful. We have also held that probable cause for an arrest without a warrant depends on whether, at the moment of the arrest, the facts and circumstances within the arresting officer's knowledge are sufficient to warrant a prudent man in believing the arrested person has committed an offense. Holbrook v. United States, 406 F.2d 44 (10th Cir. 1969); Holt v. United States, 404 F.2d 914 (10th Cir. 1968), *cert. denied*, —— U.S. —— (Feb. 24, 1969), *rehearing denied*, —— U.S. ——; Murray v. United States, 351 F.2d 330 (10th Cir. 1965); Draper v. United States, 358 U.S. 307 (1959).

We therefore are bound to conclude that the arrest was legal and the evidence seized was not tainted and was admissible in court as determined by the Supreme Court of the State of Wyoming.

A review of the record of the original trial on the burglary charge cast doubt upon the admissibility of evidence not in plain view at the time of arrest. *See* Chimel v. California, 395 U.S. 752 (1969). This is a pre-*Chimel* case, and the Supreme Court expressly pretermitted a decision whether the *Chimel* principle is to be applied retroactively. We will not make the retroactive determination with regard to the exclusionary rule stated in

Chimel, supra. Under pre-*Chimel* standards, the Supreme Court of Wyoming specifically applied the principles then enunciated by the Supreme Court of the United States, permitting the introduction of the evidence here in question.

We therefore affirm the trial court's denial of the application for the writ.

AFFIRMED.

JUDGMENT OF THE COURT OF APPEALS
FOR THE TENTH CIRCUIT

Filed September 30, 1969

SEPTEMBER TERM, SEPTEMBER 30, 1969

Before HONORABLE ORIE L. PHILLIPS, Senior Circuit Judge; HONORABLE DAVID T. LEWIS, and HONORABLE JOHN J. HICKEY, Circuit Judges.

No. 39-69

HAROLD WHITELEY, APPELLANT

v.

LEONARD MEACHAM, Warden
Wyoming State Penitentiary, APPELLEE

This cause came on to be heard on the record on appeal from the U. S. District Court for the District of Wyoming and was argued by counsel. On consideration whereof, it is ordered that the judgment of said court is affirmed.

WILLIAM L. WHITTAKER
Clerk

By /s/ RUTH H. HACOBSON
Deputy Clerk

Order of the Supreme Court Granting Certiorari in Part

Filed April 27, 1970

"The motion for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is also granted limited to the issue of the constitutionality of the arrest and search. The cease is transferred to the appellate docket and placed on the summary calendar."

☆ U. S. GOVERNMENT PRINTING OFFICE: 1970 385946 737

Supreme Court of the United States

No. **1468 Misc.** *, October Term, 19*~~6~~**69**

Harold Whiteley,

Petitioner,

v.

Warden of the Wyoming State Penitentiary

On petition for writ of Certiorari to *the United States Circuit Court of Appeals for the* **Tenth** ~~------~~ *Circuit.*

On consideration *of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby,* ~~denied~~ **granted limited to the issue of the constitutionality of the arrest and search. The case is transferred to the appellate docket as No. 1486 and placed on the summary calendar.**

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

April 27, 1970

FILE COPY

JUN 15 1970

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

NOT PRINTED

NOT PRINTED

No. ~~1486~~ 136

HAROLD WHITELEY,

Petitioner,

v.

THE WARDEN OF THE WYOMING STATE PENITENTIARY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR PETITIONER

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June , 1970

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1486

HAROLD WHITELEY,

Petitioner,

v.

THE WARDEN OF THE WYOMING STATE PENITENTIARY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the Court of Appeals for the Tenth Circuit (App. 85-93) is reported at 416 F.2d 36 (10th Cir. 1969).

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on September 30, 1969. (App. 93.) The petition for certiorari was filed on December 23, 1969 and was granted (in part) on April 27, 1970. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's arrest by the Laramie police on November 24, 1964 was based on probable cause, and if not, whether the search and seizure incident to that arrest were also illegal, thereby preventing the use of the fruits thereof as evidence at petitioner's trial in 1965.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment IV, United States Constitution

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment XIV, United States Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

A. Nature of Proceedings to Date

Petitioner sought habeas corpus relief in the United States District Court for the District of Wyoming in November 1967, pursuant to 28 U.S.C. 2254, alleging that he had been illegally arrested since no probable cause existed for his arrest and that as a consequence the fruits of the search and seizure incident thereto should not have been admitted

at his trial. On or about July 22, 1968 petitioner amended his petition to add two allegations which are not material to this review.

The history of petitioner's proceedings in the state courts of Wyoming prior to the initiation of federal proceedings is as follows:

(1) In December, 1964 Whiteley was charged with (a) breaking and entering, and (b) being an habitual criminal by the County and Prosecuting Attorney of Carbon County, Wyoming, and was tried in May, 1965 in the District Court of the Second Judicial District of the State of Wyoming, Carbon County, Wyoming, *State of Wyoming v. Whiteley*, Criminal No. 2885;

(2) Following a jury trial Whiteley was convicted of both of the above counts and sentenced to ten years on the first count and life imprisonment on the second count, the two sentences to run concurrently;

(3) Whiteley appealed this conviction to the Supreme Court of Wyoming (Docket No. 3461), which affirmed the judgment of the lower court, *Whiteley v. State of Wyoming*, 418 P.2d 164 (Wyo. 1966);

(4) In 1967, Whiteley, pursuant to Wyoming statutes, filed a petition for post-conviction relief in the District Court of the Second Judicial District of the State of Wyoming, Carbon County, Wyoming, *Whiteley v. State of Wyoming*, Civil No. 9402. After a hearing, this petition was denied on June 5, 1967. No appeal to the Supreme Court of Wyoming was taken from this decision.

By stipulation of the parties, this case in the United States District Court below was tried on the record before the trial court in the original case of *State of Wyoming v. Harold Whiteley*, Criminal No. 2885 in the District Court of the Second Judicial District of the State of Wyoming,

Carbon County, Wyoming, and on the record on appeal to the Supreme Court of Wyoming, Docket No. 3461.

The United States District Court below denied Whiteley's petition for a writ of habeas corpus on November 25, 1968. On appeal to the United States Court of Appeals for the Tenth Circuit this decision was affirmed on September 30, 1969.

B. Facts

After several business establishments in the town of Saratoga, Carbon County, Wyoming were broken into on November 23, 1964 (App. 42-47) the sheriff of Carbon County, acting upon a "tip" from an unnamed and unidentified informant (App. 52) executed a complaint reading as follows:

> I, C. W. Ogburn, do solemnly swear that on or about the 23rd day of November, A.D., 1964, in the County of Carbon and the State of Wyoming, the said Harold Whiteley and Jack Daley, defendants, did then and there unlawfully break and enter a locked and sealed building * * * contrary to the form of the Statute in such case made and provided against the peace and dignity of the State of Wyoming. (App. 28, State's Ex. 4)

Pursuant to this complaint a warrant of arrest was issued in Rawlins, Wyoming (App. 52), and a statewide radio broadcast (State item number 881) was then made to other law enforcement agencies by the sheriff's office. (App. 52-53, 29-38; State's Exs. 5 and 6.) The next night petitioner was arrested by a deputy sheriff of Albany County and the City of Laramie police in Laramie, Albany County, Wyoming solely on the basis of said broadcast. (App. 55-57, 59, 71-72, 17-25; State's Ex. 2.) Neither the deputy sheriff nor the Laramie police had either an arrest warrant or a search warrant in their possession. (App. 48-49, 57.)

Incident to the arrest petitioner's car was searched and incriminating personal property seized. (App. 57-59, 61-

70.) This evidence was subsequently used against petitioner at his trial. (R., Vol. IV, State's Exs. 9-16.)

Petitioner was charged with breaking and entering and being an habitual criminal.

At his arraignment (App. 15-16), and later at his trial (App. 61-62), petitioner contended that his rights had been violated by an unlawful search and seizure. Specific objection was made at the trial to the admission in evidence of the aforesaid incriminating personal property. (App. 61-62.)

ARGUMENT

PETITIONER'S ARREST BY THE LARAMIE POLICE WAS ILLEGAL, THE SEARCH AND SEIZURE OF PERSONAL PROPERTY INCIDENT THERETO WERE ALSO ILLEGAL, AND THE ADMISSION OF THE FRUITS OF THE SEARCH AND SEIZURE AS EVIDENCE AT PETITIONER'S TRIAL IN 1965 CONSTITUTED PREJUDICIAL ERROR.

Petitioner submits that the complaint (affidavit) by the sheriff of Carbon County, Wyoming, which complaint was the basis for petitioner's arrest warrant, was invalid on two counts; that, as a consequence, the warrant of arrest was likewise invalid; that petitioner's arrest, based as it was, solely on the warrant of arrest, was therefore illegal; that the search of his car following the illegal arrest and the seizure of incriminating personal property were also illegal; and finally that the admission of the fruits of that illegal search and seizure into evidence at petitioner's trial in 1965 constituted prejudicial error.

Let us begin with the sheriff's complaint. The relevant part of said complaint reads as follows:

> I, C. W. Ogburn, do solemnly swear that on or about the 23rd day of November, A.D., 1964, in the County of Carbon and the State of Wyoming, the said Harold Whiteley and Jack Daley, defend-

> ants, did then and there unlawfully break and enter a locked and sealed building * * * contrary to the form of the Statute in such case made and provided and against the peace and dignity of the State of Wyoming. (App. 28; State's Ex. 4)

This complaint is invalid for two reasons: (1) no facts concerning the criminal acts were set forth therein as required by *Giordenello v. United States*, 357 U.S. 480 (1958) and *Aguilar v. Texas*, 378 U.S. 108 (1964), and (2) no "underlying circumstances" were alleged to indicate that the information relied upon by the sheriff in drafting said complaint came from a tip from an unidentified informer (App. 52), or that said informer was reliable. *Aguilar v. Texas, supra.*

All we can find in the sheriff's complaint are "mere conclusions" which *Giordenello* held insufficient as a ground for a determination of probable cause. There were no factual allegations in the complaint at bar to indicate that petitioner had committed the crime of breaking and entering, or, for that matter, any crime. There was no information which could have given the justice of the peace who issued the warrant for petitioner's arrest any grounds from which he could have determined that probable cause existed to believe that petitioner had committed the crime alleged in the complaint. Nevertheless, the justice of the peace issued a warrant of arrest on the authority of this defective complaint.

In *Giordenello* this Court held that a complaint which merely stated the affiant's mere conclusions couched in the words of the statute could not support a valid arrest warrant. Mr. Justice Harlan said at page 486 of 357 U.S. 480:

> *The purpose of the complaint, then is to enable the appropriate magistrate * * * to determine whether 'the probable cause' required to support a warrant exists. The Commissioner must judge for himself* the persuasiveness of the *facts* relied on by a complaining officer to show probable cause. He should

> not accept without question the complainant's *mere conclusion* that the person whose arrest is sought has committed a crime.
>
> * * * The complaint contains no affirmative allegation that the affiant *spoke with personal knowledge of the matters contained therein; it does not indicate any source for the complainant's belief;* and it does not set forth any other sufficient bases upon which a finding of probable cause could be made. (Emphasis added)

Although *Giordenello* originally appeared to rest on the federal rules of criminal procedure applicable only to federal prosecutions, *Aguilar v. Texas*, 378 U.S. 108, 112 fn. 3 (1964), made it clear that: "The principles announced in *Giordenello* derived, therefore, from the Fourth Amendment, and not from our supervisory power." The Court also stated at page 110 that since *Ker v. California*, 374 U.S. 23 (1963), had held "that 'the standard of reasonableness is the same under the Fourth and Fourteenth Amendments'" it had to be read "as holding that the standard for obtaining a search warrant is likewise 'the same under the Fourth and Fourteenth Amendments.'"

In *Barnes v. Texas*, 380 U.S. 253 (1965), a case somewhat similar to the one at bar since it also involved an arrest warrant based on a defective complaint, *Giordenello* and *Aguilar* were cited in a *per curiam* opinion as the sole basis for reversal of the decision below in *Barnes v. State*, 390 S.W.2d 266 (Texas 1964). The only factual difference between *Barnes* and this case is that here the sheriff of Carbon County who obtained the warrant of arrest did not make the arrest. He sent out a statewide radio broadcast (App. 52-53) which resulted in the arrest being made by a deputy sheriff of Albany County together with the city police of Laramie. (App. 55-57, 59, 71-72.)

The second defect in the complaint relates to its utter failure to show that the information contained therein had come from an informer and that said informer was worthy

of the sheriff's reliance. In this area, as in the former, this Court has laid down strict guidelines for both federal and state courts, as well as federal and state law enforcement personnel, to follow. In *Draper v. United States*, 358 U.S. 307 (1959), it was held that while an informant's identity need not be disclosed, the Court would closely scrutinize the record to see that in fact the informant was a sufficiently reliable source so as to justify reliance by the police on the information supplied by the informant. The Court then dilligently went through the history of the relationship between the informant and the police agents before affirming that there indeed the police were acting on probable cause. See, also *Jones v. United States*, 362 U.S. 257 (1960), where an affidavit based on hearsay of an informer was held valid because *inter alia* the informer was reliable and this fact was included in the affidavit.

And in *Aguilar v. Texas*, 378 U.S. 108, 114, 115 (1964), this Court made clear for all county attorneys, sheriffs' offices and justices of the peace that informers had to be reliable and this fact had to be included in the complaint or affidavit submitted as a basis for issuing a warrant:

> * * * although an affidavit may be based on hearsay information and need not reflect the direct personal observation of the affiant * * * the magistrate must be informed of [1] some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were and [2] some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, * * * was 'credible' or his information was 'reliable.' Otherwise, the 'inference from the facts which lead to the complaint' will be drawn not by 'a neutral and detached magistrate,' as the Constitution requires, but instead by a police officer 'engaged in the often competitive enterprise of ferreting out crime.' *Giordenello v. United States.*

In *Beck v. Ohio*, 379 U.S. 89 (1964), the conviction of petitioner was reversed due to the failure of the State to prove the existence of probable cause "at the moment of arrest." Mr. Justice Stewart, writing for the majority, at page 97, added:

> * * * But when the constitutional validity of that arrest was challenged, it was incumbent upon the prosecution to show with considerably more specificity than was shown in this case what the informer actually said, and why the officer thought the information was credible.

Again in *McCray v. Illinois*, 386 U.S. 300 (1967), this Court discussed the need for the informant to be reliable in order for probable cause to exist. McCray was arrested, without a warrant, in Chicago for possession of narcotics. The arrest was made on the basis of a conversation with an unidentified informer who had told the two officers that McCray was selling narcotics and had narcotics on his person and that he could be found in a specific vicinity. The officers proceeded to this locale, saw McCray and then arrested him. In the search incidental to arrest heroin was discovered on McCray's person.

Defendant moved to suppress the evidence and at the hearing Officer Jackson testified on direct examination that he had known the informant for about a year, that during this period he had received information about narcotics about 15-16 times from said informant, that the information had been accurate and had resulted in numerous arrests and convictions. On cross-examination Jackson refused to identify the informant and the Court sustained the objection. Officer Arnold testified, on direct, to substantially the same facts, adding that the informant had *actually observed* McCray selling narcotics.

McCray's conviction was affirmed and it was held that in a hearing on a motion to suppress the informer's identity need not be revealed unless the magistrate has reason to doubt the police officer's credibility. But the significance

of *McCray* to petitioner in this case may be found in the Court's re-affirmance of the need for the existence of underlying circumstances indicating not only (1) that a crime had been or was being committed by a particular person, but also (2) that the informer was credible and reliable.

It is clear then that *McCray* requires on the part of officers making an arrest without a warrant knowledge of the underlying circumstances relating to both probable cause concerning the crime, as well as the informer's reliability. And, of course, when warrants are sought, whether they be search or arrest warrants, such underlying facts must be set forth in the affidavit submitted to the magistrate or justice of the peace.

The rule of the foregoing cases may be summarized as follows: a tip from an unidentified informer cannot be the basis for an arrest warrant unless the police officer alleges in his complaint that he has received information from this same informer on prior occasions and that said information has always been reliable. *Draper, Jones, Beck,* and *McCray, supra.*

In this instance, the complaint not only fails to allege that the informant, who was the source of the sheriff's information, had been reliable in the past, but does not even indicate that an informant existed. From a reading of the complaint it would appear that the *sheriff* was the source of the allegations contained therein.

Both strands of the probable cause wire were brought together in a single capstone decision in *Spinelli v. United States,* 393 U.S. 410 (1969), when this Court, relying on *Aguilar,* reversed petitioner's conviction. Not only did the affidavit which served as the basis for a search warrant offer no ground for the conclusion that affiant's confidant was "reliable," but the affidavit also failed on a second count. Mr. Justice Harlan, speaking for the majority, put it in the following language at page 416.

> * * * Perhaps even more important is the fact that *Aguilar's other test* has not been satisfied. The tip does not contain a sufficient statement of the underlying circumstances from which the informer concluded that Spinelli was running a bookmaking operation. We are not told how the FBI's source received his information—it is not alleged that the informant personally observed Spinelli at work or that he had ever placed a bet with him. Moreover, if the informant came by the information indirectly, he did not explain why his sources were reliable. Compare *Jaben v. United States*, 381 U.S. 214 (1965). In the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in sufficient detail so that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation. (Emphasis added)

So, it is now quite clear that the underlying facts—both as to the unidentified informer's reliability and the criminal conduct itself—must be set forth in the police officer's affidavit used as a basis for the issuance of either a search warrant or an arrest warrant. And, this is especially important: it is of no consequence that the agents might have had additional information which could have been given to the Commissioner. "It is elementary that in passing on the validity of the warrant, the reviewing Court may consider *only* information brought to the magistrate's attention." *Aguilar v. Texas*, 378 U.S. 108, 109 fn. 1 (1964) (emphasis in original).

Thus, it is clear that the State of Wyoming has never proven that probable cause actually existed at the time the warrant of arrest was sought. And, of course, the burden is on the state to prove the existence of probable cause. *Cervantes v. United States*, 263 F.2d 800 (9th Cir. 1959); *United States v. Rivera*, 321 F.2d 704 (2nd Cir. 1963); *Thompson v. White*, 406 F.2d 1176 (5th Cir. 1969).

Three courts, namely, the Supreme Court of Wyoming in *Whiteley v. State*, 418 P.2d 164, 167 (Wyo. 1966); the United States District Court for the District of Wyoming in *Whiteley v. State of Wyoming*, 293 F.Supp. 381, 387 (D. Wyo. 1968); and the United States Court of Appeals for the Tenth Circuit in *Whiteley v. Meacham*, 416 F.2d 36, 40 (10th Cir. 1969), have previously passed on the precise issue now before this Court and each court has made the same error, to wit: that although an arrest warrant had issued, the arrest was valid *as a warrantless arrest* based on the fact that the arresting officer had reasonable or probable grounds to suspect Whiteley of having committed a felony. At this point one thing must be made clear: the arresting officers had no independent knowledge of either the crime or of Whiteley's actions for the period from the moment said crime was committed to the moment of arrest. (App. 55-57, 59, 71-72.) So the question posed to this Court is not whether an arrest based on an invalid arrest warrant may still be valid if sufficient probable cause exists to support a warrantless arrest. The question rather is whether an arrest based on an invalid arrest warrant and without any independent basis on the part of the arresting officer to support a warrantless arrest is valid. These are two entirely different questions. Here, we have no grounds for an arrest by the arresting officer other than the radio call from the Carbon County sheriff's office, which of course was based on the invalid arrest warrant. Let us look at the facts once more. The Laramie Police (Laramie is the largest city in Albany County) received notice from the Albany County sheriff's office calling for the arrest and detention of Whiteley on the authority of a radio item placed on the state police network, which radio item had been broadcast by the sheriff of Carbon County on the authority of the warrant issued for Whiteley's arrest. The Laramie police officer who first stopped Whiteley testified on the stand that he made this arrest on the authority of a notice posted on the bulletin board at the Laramie City Police station. (App. 71.) The police did not stop Whiteley for the breach

of a traffic regulation or for any act by him in their presence. On the contrary, petitioner was stopped and arrested for only one reason, namely, a warrant of arrest had been issued by a justice of the peace in Carbon County, the sheriff's office in Albany County had been notified thereof by a radio broadcast, and that office in turn had notified the Laramie police department of said warrant. The Laramie police had no reason to stop petitioner, or to believe that he was in any manner guilty of the crime of breaking and entering other than by authority of the radio call from the sheriff's office in Carbon County.

As was demonstrated by the Second Circuit Court of Appeals in 1955, the police may make an arrest and later evidence may prove them right, but, when later challenged by an accused, they must demonstrate that originally they had probable cause to support an arrest without a warrant. "Courts cannot put a stamp of approval upon actions of the police when the officers, challenged by an accused, fail or refuse to demonstrate compliance with the rules which circumscribe their authority." *Wrightson v. United States*, 222 F.2d 556, 558 (2nd Cir. 1955). This opinion was cited with approval by the Supreme Court in *Wong Sun v. United States*, 371 U.S. 471, 480 (1963). Thus, while the Laramie police may have performed their duty as stated by the Supreme Court of Wyoming, *Whiteley v. State*, 418 P.2d 164, 167 (Wyo. 1966), it remains for the State to show that they acted upon probable cause. Obviously, the Laramie police had no reason of their own to believe that petitioner committed the crime of breaking and entering certain stores in Saratoga, Wyoming. It should be noted here that Sheriff Ogburn himself would have been unable to arrest Whiteley legally – with or without the aid of the warrant – for no crime was committed in his presence and the sole source of his information was from an informant not proven to be reliable in the past. *Draper v. United States*, 358 U.S. 307 (1959). The sheriff did testify at the trial that he acted on the basis of a tip when he executed the complaint, but he did not testify as to the identity of

said informant or that he was reliable and credible as required by the Fourth and Fourteenth Amendments to the United States Constitution as construed by this Court.

I should be noted here that the Circuit Court of Appeals below felt that the Laramie police officers had the right to rely on the state police radio bulletin broadcast by the sheriff of Carbon County since he was "known to them to be reliable" (App. 92), but if this were so then any invalid complaint or warrant of arrest could be rehabilitated merely by sending out a police radio broadcast to arrest the subject of the warrant. Not only is this not the law but another United States Court of Appeals specifically rejected such an argument in *United States v. Pearce*, 275 F.2d 318 (7th Cir. 1960). There, an F.B.I. agent had averred in an affidavit that the accused committed the crime, and that he, the affiant, had probable cause to so believe that such was true because he had received this information from a reliable informant. In that case, the court forced the government to disclose the identity of the "reliable informant" who turned out to be none other than the complaining agent's superior. The superior had received the information from another agent who had received the information from an informant not previously known to any of the series of agents, and therefore never proven to be reliable. The court held that such information which had not established itself as reliable could not form the basis for a belief by a reasonable and prudent man that the named accused was guilty of the crime charged.

Another similar case is *Thompson v. White*, 406 F.2d 1176, 1178 (5th Cir. 1969), where the Court of Appeals for the Fifth Circuit held that "information from an unknown source or a source unverified as to its consistent reliability does not establish probable cause."

In view of the foregoing it is clear that under no possible theory can this court find the existence of probable cause to support the arrest of petitioner, whether with or without a warrant. The State's warrant was defective and no fac-

tual basis existed for a warrantless arrest by the Laramie police. For an excellent discussion of this very case after the Supreme Court of Wyoming had decided it, see 2 Land and Water Law Review 477 (1967).

Once it is established that the arrest was illegal the rest of the argument falls easily into place. A search incident to an illegal arrest is itself illegal and any evidence obtained by such search and seizure is inadmissible in a state court criminal proceeding. *Mapp v. Ohio*, 367 U.S. 643 (1961); *Beck v. Ohio*, 379 U.S. 89 (1964); *Wong Sun v. United States*, 371 U.S. 471 (1963); *Traub v. Connecticut*, 374 U.S. 493 (1963).

At no time during these federal habeas corpus proceedings has petitioner contended that if the arrest was legal the subsequent search and seizure of contraband and burglars' tools was illegal on the ground that a search warrant should have been sought. This was due to the belief by counsel that under the posture of the law prior to *Chimel v. California*, 395 U.S. 752 (1969), the search of an arrestee's automobile – glove compartment, trunk, the entire vehicle – was permissible if he was arrested for a crime like breaking and entering and if it was likely that the fruits of such offense "might be found in the car." Modern Criminal Procedure, Third Edition, Hall, Kamisar, La Fave & Israel, page 278. We mention this particular point here for only one reason. Although we do not believe it proper to raise an issue in this Court not raised below, Whiteley is under a life sentence, and *Chimel* came down only a few weeks prior to the oral argument in the court below. Therefore, if this Court should decide against petitioner on the issue of probable cause, it may wish to consider the question as to whether *Chimel* is retroactive. For if *Chimel* is retroactive then it is submitted the search and seizure of personal property from the trunk and interior of Whiteley's automobile was illegal regardless of the validity of his arrest.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed.

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June 15, 1970

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IN THE

Supreme Court of The United States

OCTOBER TERM, 1969

No. [redacted] 136

HAROLD WHITELEY,

Petitioner,

v.

THE WARDEN OF THE WYOMING STATE PENITENTIARY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT

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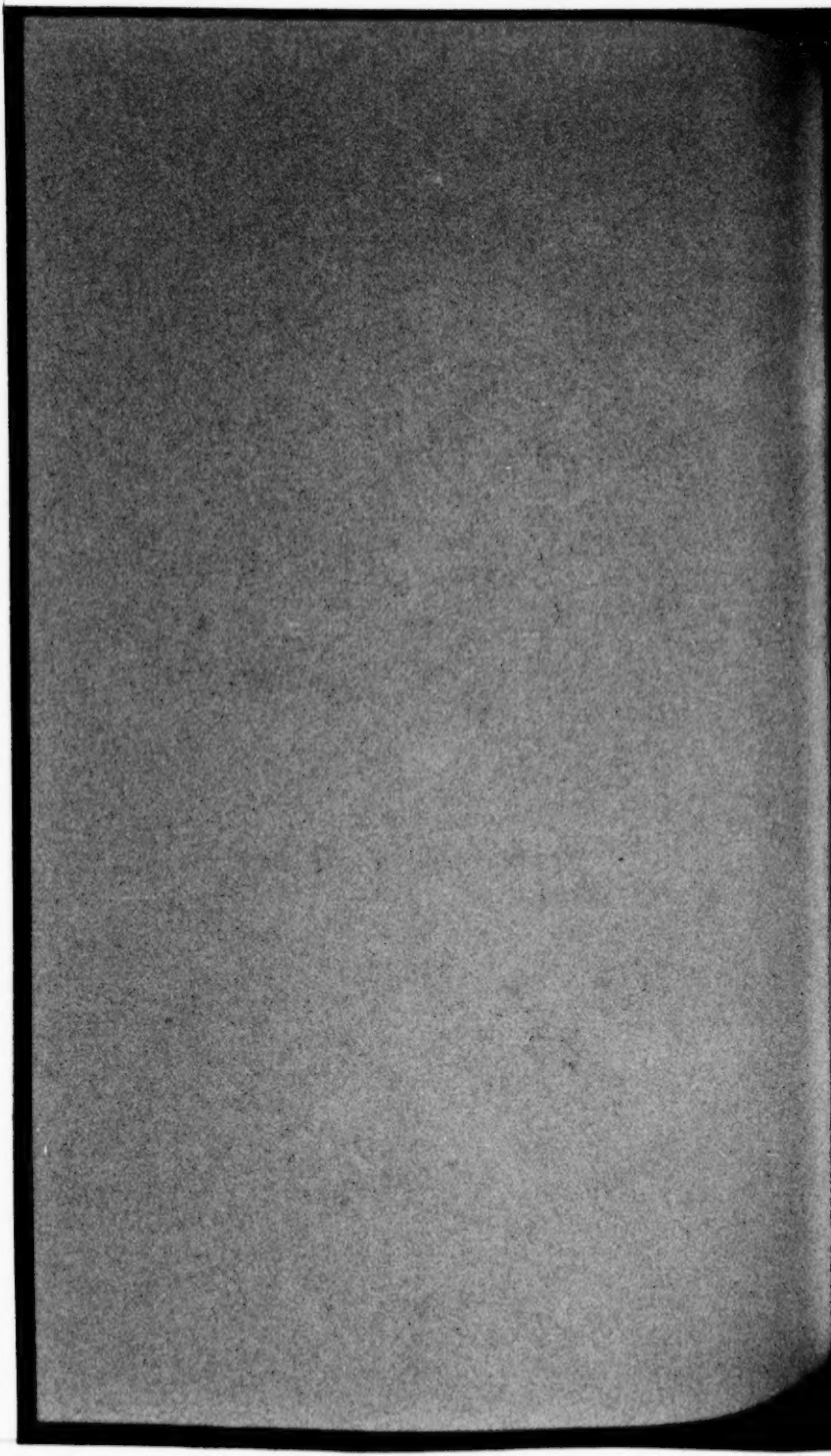

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IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1969

No. 1486

HAROLD WHITELEY,

Petitioner,

v.

THE WARDEN OF THE WYOMING
STATE PENITENTIARY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the Supreme Court of Wyoming is reported at 418 P. 2d 164 (1966). (This case establishes the factual issues pertaining to probable cause for the arrest and subsequent search and seizure.) The opinion of the United States District Court for the District of Wyoming (App. 73-82) is reported at 293 F. Supp. 381 (D. Wyo. 1968).

QUESTION PRESENTED

Whether petitioner's arrest by the Laramie police on November 24, 1964, was based on probable cause and, if not, whether the search and seizure incident to that arrest was also illegal and, if so, was the introduction of such illegally seized contraband at petitioner's trial reversable prejudicial error.

STATEMENT

A. Nature of Proceedings to Date

The state generally accepts the Statement of Case set out in petitioner's Brief; however, the state wishes to succinctly present for the benefit of the court the following chronological listing of courts which have reviewed the very issue now before this court with the appropriate dates and citations. Each of the following-named courts has reviewed the entire record of petitioner's case, particularly as relates to the question of whether or not there was probable cause for the law enforcement officers to make the arrest and subsequent search and seizure of items from petitioner's car. Each court has come to the same conclusion, that a law enforcement officer has the authority and *duty* to make a warrantless arrest when the totality of the circumstances indicates that a felony has been committed.

(1) Wyoming Supreme Court, original appeal of petitioner's case, decision reported at 418 P.2d 164 (Wyo. 1966).

(2) Wyoming District Court, petition for Post-Conviction Relief, unreported decision handed down June 5, 1967. No appeal perfected (App. 6-7).

(3) United States District Court for the District of Wyoming, Habeas Corpus Petition, decision reported at 293 F. Supp. 381 (D. Wyo. 1968).

(4) United States Court of Appeals for the Tenth Circuit, Appeal of Habeas Corpus Action, decision reported at 416 F.2d 36 (10th Cir. 1969).

B. Facts

In addition to the facts related in the Statement of Case in petitioner's Brief, the state supplies the following. The complaining witness, C. D. Ogburn, Sheriff of Carbon County, Wyoming, testified that after he received the arrest warrant from Magistrate O. E. Castle, Justice of the Peace, Carbon County, Wyoming, he caused to be placed on the state police network radio "Highway Patrol Item 881" (App. 52-53). State Highway Patrol Item 881 (App. 31, 37) spelled out with particularity the name and description of the petitioner, including height, weight and color of hair. It further related the description of the automobile which petitioner was driving when arrested and it further detailed a partial description of the stolen property, including reference to an amount of cash taken and old coins.

In addition to the introduction of these seized items at petitioner's trial in November, 1964, there is testimony by the petitioner's accomplice to the effect that the petitioner was guilty of committing the felony of breaking and entering. It is noted that this line of testimony was presented to the jury prior to the introduction of the seized contraband found in petitioner's car (App. 42-47).

ARGUMENT

WHETHER PETITIONER'S ARREST BY THE LARAMIE POLICE ON NOVEMBER 24, 1964, WAS BASED ON PROBABLE CAUSE AND, IF NOT, WHETHER THE SEARCH AND SEIZURE INCIDENT TO THAT ARREST WAS ALSO ILLEGAL AND, IF SO,

WAS THE INTRODUCTION OF SUCH ILLEGALLY SEIZED CONTRABAND AT PETITIONER'S TRIAL REVERSABLE PREJUDICIAL ERROR.

The key to the presentation before this court is one based on facts rather than law. The central issue is a determination of whether or not there was sufficient probable cause, based on the totality of the circumstances, for the arresting officers to make an arrest of the petitioner. The Tenth Circuit held that there was (App. 92). Throughout the lower state and federal courts petitioner has attempted to equate the case law and treatise authorities concerned with the requisite probable cause necessary in the mind of a judicial officer for issuance of an arrest or search warrant to be the same requisite probable cause for an arresting officer to make a warrantless search. Quite clearly the lower courts, starting with the Wyoming Supreme Court, have made the factual determination that there existed the requisite probable cause for arresting officers to make the arrest of petitioner without a warrant. These courts have not imposed upon the arresting officer the reasoning petitioner urges upon this court that the criteria for finding probable cause imposed upon a judicial officer prior to issuing an arrest or search warrant should be the same for an arresting officer prior to making a warrantless arrest.

Early in these proceedings the Wyoming Supreme Court made the factual determination that the law enforcement officers did have sufficient probable cause to believe that the petitioner had committed a felony (See *Whiteley v. State*, 418 P.2d 164, 167, Wyo. 1966). Because of this finding the United States Court of Appeals for the Tenth Circuit, pursuant to Title 28, U.S.C., Section 2254, held that these factual issues determined by the state court shall be presumed to be correct (App. 86). The Tenth Circuit

further held, relying on this statute, that neither the record before them nor the brief of arguments of petitioner question the key factual determination of the Wyoming court that the arresting officer had probable cause to make the arrest. The state suggests that the legal basis upon which petitioner makes his argument before this court is grounded upon a factual premise that does not exist anywhere in the record that has been presented before this court or, for that matter, before any court. Specifically, petitioner centers his legal arguments and logic on the facual premise that probable cause was not present for a judicial officer to issue an arrest warrant which *directly* or *indirectly* resulted in an illegal arrest of petitioner. This factual determination was not made by the Wyoming Supreme Court and there is nothing in the record upon which this legal argument can be based.

It is clear from the record presented before this court that the arresting officers who made the arrest of petitioner did so in the belief that the petitioner had committed a felony. The law enforcement officers knew the petitioner based on a fairly detailed description. They further knew that there was a great possibility that the petitioner had in his possession the stolen goods. The law enforcement officers knew this information not from an arrest warrant that was issued by O. E. Castle, the local Justice of the Peace, but rather from a Highway Patrol Item 881 (App. 31, 37). The arresting officer, Undersheriff Lankford of Albany County, testified that he knew exactly what he was searching for from this Highway Patrol Item (App. 59). The record fails to reveal that the law enforcement officers who made the arrest were relying upon anything other than contained in Highway Patrol Item 881. It is clear the Wyoming court considered this in arriving at the conclusion that the arresting officers not only had a right but a duty to make the arrest of petitioner based upon the Highway Patrol bulletin. In this case the law enforcement offi-

cers in the regular course of their employment were advised in the usual method from their superiors that the petitioner was a suspected felon. There is testimony to indicate that the arresting officer knew the petitioner's companion, had a detailed description of petitioner and his car (App. 56, 59). It was concluded by the Wyoming court that had the arrest not been made the officer would have been in violation of his duty (See *Whiteley v. State*, 418 P.2d 164, 167 (Wyo. 1966). Further, the Tenth Circuit took the position that there existed probable cause for the detention which was established at the Preliminary Hearing and reinforced at the trial by decision of the Wyoming Supreme Court (App. 91).

Incident to this lawful arrest the petitioner's car was searched within the immediate proximity of the petitioner (App. 48, 56, 58). The petitioner, in the closing paragraphs of his petition, makes reference to *Chimel v. California*, 395 U.S. 752 (1969). He fairly acknowledges that this aspect of the case was not reviewed by the Tenth Circuit. The state certainly urges this court not delve into this aspect of the case without a factual record to consider. Further, the search of petitioner's car occurred in November of 1964, which makes in pre-Chimel in nature.

The legal principles relied upon by the state throughout this entire litigated process have been based on the premise that a law enforcement officer may make a warrantless arrest if he has requisite probable cause, which can be something less than the requisite probable cause that must be presented to a judicial officer prior to the issuance of an arrest or search warrant. Most certainly the state's original Brief presented to the Wyoming Supreme Court made this point very clearly (R., Vol VI, pages 14 and 15).

> Second, that in order for the search and seizure to be legal, the arrest, if without a warrant and for a felony not committed in the presence of officers must

be on probable cause. See *Draper v. U.S.*, 358 U.S. 307, 3 L.Ed.2d 327, 79 S.Ct. 329; *Henry v. U.S.*, supra; *State v. George*, supra. Third, that probable cause is present when the facts and circumstances known to the officers warrant a prudent man in believing an offense has been committed. See *Henry v. U.S.*, supra; *Carroll v. U.S.*, 267 U.S. 132, 45 S.Ct.Rep. 280, 69 L.Ed. 543; *People v. Carr*, 370 Mich. 251, 121 N.W.2d 449. Fourth, that the arresting officers need not have a quantum or quality of evidence necessary to convict. See *Wong Sun v. U.S.*, supra. Fifth, that the arresting officers are not dealing with fine legal points, but are dealing with considerations of every day life and are entitled to use their reasoning facilities upon all the facts of which they had knowledge with respect to the person arrested. See *Draper v. U.S.*, supra; *Carroll v. U.S.*, supra. Sixth, that the right to search is not dependent upon the practicality or ease of getting a search warrant. See *Kerr v. California*, 374 U.S. 23, 10 L.Ed.2d 726; *United States v. Rabinowitz*, supra; *State v. George*, supra. Seventh, that each case turns on its own facts. See *Brenigan v. State*, 97 Okla. Cr. 299, 262 P.2d 464.

It is the state's position that the federal Supreme Court law cited to the Wyoming Supreme Court is still proper law today and has not been modified by the recent cases of *Aguilar v. Texas*, 378 U.S. 108 (1964); *Barnes v. Texas*, 380 U.S. 253 (1965); *Giordenello v. United States*, 357 U.S. 480 (1958); *McCray v. Illinois*, 386 U.S. 300 (1967); and *Spinelli v. United States*, 393 U.S. 410 (1969). It is clear that the Wyoming Supreme Court relied upon these legal arguments and authorities in reaching its 1966 decision (See *Whiteley v. State*, 418 P.2d 164, 167). The state feels in reading *Aguilar*, *Barnes* and their companion cases that they must be read in light of their *peculiar* and *unique*

factual situations and should not be expanded beyond the purview of these factual situations.

In addition to the presence of sound logic and case law to support the state's position as to the presence of probable cause for the arrest, there are additional legal grounds to deny petitioner's relief. There is no showing in the record or legal arguments advanced by petitioner to support the proposition that the introduction of the seized evidence at petitioner's trial constitutes prejudicial error to the extent that petitioner's constitutional rights were violated. The case law is clear that petitioner has the burden to prove how the alleged error occurred and the existence of prejudice to the extent that petitioner's constitutional rights have been denied. *Buchalter v. People*, 319 U.S. 427, 431, 63 S.Ct. 1129, 87 L.Ed. 1492 (1943); *U.S. v. Hardy*, 351 U.S. 454, 462, 76 S.Ct. 965, 100 L.Ed. 1331 (1956). Absent a showing of prejudicial error by petitioner, the assertion will not stand. (See *State v. Spears*, 76 Wyo. 82, 300 P.2d 551 (1956); *Lowe v. U.S.*, 389 F.2d 108, 112 (8th Cir. 1968). In the case at bar the record is replete with testimony which clearly establishes guilt of petitioner without reference to seized evidence (App. 42-47). (See *Holmes v. U.S.*, 383 F.2d 925, 931 (D.C. Cir. 1967).

It is respectfully urged upon this court that should it consider petitioner's legal arguments as meritorious, the state should be given an opportunity prior to final decision by this court to develop a record which would reflect the basis upon which the Wyoming judicial officer issued the arrest warrant. Clearly the record before this court is void of any presentation as to whether or not there was the requisite probable cause present for the issuance of the arrest warrant by the judicial officer. In fairness to all sides, the state should be given an opportunity to make an evidentiary record if this court at this late date accepts the legal reasoning of petitioner. The reason this eviden-

tiary record has not been made at the various sundry post-conviction and habeas hearings is because the state has felt, based on precedent and logic, that no court would accept the legal reasoning of petitioner.

CONCLUSION

From the foregoing it is submitted that the petitioner has failed to establish sufficient legal arguments supported by authorities and further has failed to cite exact record references to overcome the provisions of appellate review as manifested in Rule 52 (a) of the F.R. Civ. P. which holds in part, "Findings of fact shall not be set aside unless clearly erroneous. . . " Judge Kerr's Memorandum (App. 73 et seq.) sets forth specific findings of fact on the issue presented by petitioner to this court. These findings of the District Court which received the approval of the United States Court of Appeals for the Tenth Circuit are entitled to the approval of this court sitting in review unless "clearly erroneous".

It is respectfully urged upon this court to affirm the judgments issued by the United States District Court for the District of Wyoming (App. 83) and the U.S. Circuit Court of Appeals for the Tenth Circuit (App. 93) and thereby deny petitioner the relief he has sought in his Petition for Certiorari as re-defined in his Brief filed before this court.

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July 10, 1970

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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 136

HAROLD WHITELEY,
Petitioner,

v.

THE WARDEN OF THE WYOMING
STATE PENITENTIARY,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 136

HAROLD WHITELEY, *Petitioner*

v.

THE WARDEN OF THE WYOMING STATE PENITENTIARY, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR PETITIONER

ARGUMENT

In the sub-section captioned "Facts" in the STATEMENT portion of Respondent's Brief (p. 3) reference is made to the fact that State Highway Patrol Item 881 (App. 31, 37) described petitioner "with particularity" with respect to his height, weight and color of hair, petitioner's automobile and the stolen property. If this is an attempt to come within *Draper v. United States*, 358 U.S. 307 (1959) insofar as credibility is concerned it must fail. First, the unidentified informer apparently advised Sheriff Ogburn that Whiteley had committed the crime, but the record is barren as to any description of Whiteley by said informer. We must therefore conclude that the informer knew Whiteley and merely gave his name to the Sheriff. Since Whiteley had a prior record (he was convicted of (a) breaking and entering, and

(b) being an habitual criminal), it is obvious that the authorities had a physical description of him which they used in State Highway Patrol Item 881. At any rate, there is no evidence in the record tending to show that the informant gave the particulars of Whiteley's physical appearance to the sheriff.

Second, in *Draper* the informant placed Draper at a certain place at a specific time and doing a particular thing, indicating that Draper himself had told the informant that he would be doing these acts and exactly when and where he would be doing them. Such specifics of time, place and action are lacking in this case.

Third, *Draper* involved a warrantless arrest, while this case—at least at the time of arrest—depended on a warrant, and, indeed, cannot be justified as a warrantless arrest for the reasons set forth in Petitioner's opening Brief at pp. 12-15.

Fourth, in *Draper*, the informant was found to be reliable. No such evidence exists in the case at bar. This alone, of course, is fatal to Respondent's case.

Respondent contends that both the Wyoming Supreme Court and the Circuit Court of Appeals for the Tenth Circuit "have made the factual determination that there existed the requisite probable cause for arresting officers to make the arrest of petitioner without a warrant" (p. 4, Respondent's Brief). Since the facts are not in dispute the question rather is whether the arresting officers had, as a matter of law, probable cause to make an arrest without a warrant. As indicated above, this issue was argued by Petitioner in his opening Brief at pp. 12-15. We merely stress here that the question is not a factual one, but rather a question of law.

At page 6 of its Brief Respondent states that the probable cause for a warrantless arrest "can be something less" than that required for the issuance of a warrant. This, of course, is not the law as was so aptly put by the Court in *Wong Sun v. United States*, 371 U.S. 471, 479-480 (1963):

> Whether or not the requirements of reliability and particularity of the information on which an officer may act are more stringent where an arrest warrant is absent, they surely cannot be less stringent than where an arrest warrant is obtained. Otherwise, a principal incentive now existing for the procurement of arrest warrants would be destroyed.

The State also argues (p. 8, Respondent's Brief) that "the introduction of the seized evidence at petitioner's trial" has not been shown by petitioner to constitute prejudicial error. It is submitted that the answer to this contention can be found in *Fahy v. Connecticut*, 375 U.S. 85 (1963) and *Chapman v. California*, 386 U.S. 18 (1967) where, in the latter case, the burden of showing the absence of prejudicial error was placed on the prosecution side and not "the person prejudiced by it." Moreover, even Daley who testified for the State would have been unavailable as a witness had it not been for the illegal arrest. His testimony was "fruit of the poisonous tree" just as much as the seized contraband.

Finally, Respondent asks for an opportunity "to develop a record which would reflect the basis upon which the Wyoming judicial officer issued the arrest warrant" if this Court should "consider petitioner's legal arguments as meritorious" (p. 8, Respondent's Brief). The short answer to this is that both sides stipulated to the facts upon which this habeas corpus proceeding was to depend (App. 10-12) and it is too late at this stage of the proceedings to ask to develop a record. Furthermore, in counsel's opinion, Whiteley should have been acquitted in his original trial in May 1965 and, if this assumption is correct, then Whiteley has

been illegally imprisoned for well over five years. It is time to end this case once and for all.

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OPINION

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

WHITELEY *v.* WARDEN, WYOMING STATE PENITENTIARY

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 136. Argued January 13, 1971—Decided March 29, 1971

A sheriff, acting on a tip, made a complaint before a magistrate charging that petitioner and another individual on the date and at the place named "did then and there unlawfully break and enter into [the described] locked . . . building," and a warrant was issued. A police radio bulletin named and described the two persons, the type of car they were probably driving, and the amount and type of money taken. Relying on the bulletin, an officer in another county made a warrantless arrest of the suspects. The car was then searched and various incriminating items removed, which were later used at petitioner's trial, which resulted in his conviction. Petitioner filed a habeas corpus petition reiterating the challenge he had made at his arraignment and trial to the constitutionality of the use of evidence seized during a search incident to the assertedly illegal arrest. The District Court denied the petition, and the Court of Appeals affirmed. *Held:*

1. Petitioner's arrest violated his rights under the Fourth and Fourteenth Amendments and the evidence secured incident thereto should have been excluded from his trial. Pp. 4–8.

(a) The complaint, which did not mention that the sheriff acted on an informer's tip, and which consisted of no more than the sheriff's conclusion that the individuals named committed the offense, could not support the independent judgment of a disinterested magistrate. P. 5.

(b) The standards applicable to the factual basis for an arresting officer's probable cause assessment are no less strict than those applicable to the magistrate's assessment. Here the arresting officer had no information to corroborate the report that the suspects had committed the crime and the fact that the

Syllabus

warrantless arrest was based on a police radio bulletin cannot supply the element of probable cause that the officer who issued the bulletin lacked. Pp. 6–7.

2. Since, notwithstanding petitioner's constitutional challenge at each stage, respondent made no attempt to show that the magistrate had more information than was presented in the complaint, he may not attempt to do so now on remand; and the writ must issue unless the State appropriately arranges to retry the petitioner. Pp. 8–9.

416 F. 2d 36, reversed and remanded.

HARLAN, J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, STEWART, WHITE, and MARSHALL, JJ., joined. BLACK, J., filed a dissenting opinion, in which BURGER, C. J., joined. BLACKMUN, J., filed a dissenting statement.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 136.—October Term, 1970

Harold Whiteley, Petitioner, *v.* Warden of Wyoming State Penitentiary. | On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

[March 29, 1971]

Mr. Justice Harlan delivered the opinion of the Court.

Petitioner Whiteley, in 1965, was convicted in the District Court of the Second Judicial District of the State of Wyoming on charges of breaking and entering and being an habitual criminal.[1] Both at his arraignment and at trial Whiteley challenged the constitutionality of the use of evidence seized during a search incident to an arrest which he claimed was illegal. The trial court overruled petitioner's motion to suppress, and on appeal the Supreme Court of Wyoming affirmed. *Whiteley* v. *State*, 418 P. 2d 164 (1966). This proceeding commenced with a petition for habeas corpus in the United States District Court for the District of Wyoming, which was denied on November 25, 1968.[2] *Whiteley* v. *Wyoming*, 293 F. Supp. 381. On appeal, the United States Court of Appeals for

[1] He was given concurrent sentences on the breaking and entering charges of one to 10 years and, in consequence of the recidivist charge, imprisonment for life.

[2] Prior to commencing federal habeas corpus proceedings, Whiteley had filed a petition for post-conviction relief pursuant to the Wyoming statutes. No appeal was taken from the denial of that petition.

the Tenth Circuit affirmed. *Whiteley* v. *Meacham*, 416 F. 2d 36 (CA10 1969). We granted certiorari, limiting the writ to the issue of the constitutionality of the arrest and ensuing search and seizure. 397 U. S. 1062 (1970).[3] We reverse the judgment of the Tenth Circuit for the reasons stated herein.

I

The circumstances surrounding petitioner's arrest and the incidental search and seizure, as stated by the Wyoming Supreme Court, 418 P. 2d 164, 165–166, are as follows:[4]

> "On November 23, 1964, certain business establishments in Saratoga were broken into, including the Rustic Bar and Shively's Hardware, the offenses being investigated by the Carbon County Sheriff [Sheriff Ogburn] who, acting on a tip, the next day signed a complaint charging defendant and another

[3] In his petition for habeas corpus, Whiteley raised several other issues which had previously been advanced in his state petition for post-conviction relief, but not in his direct appeal to the Supreme Court of Wyoming. On these other issues, both lower federal courts held that failure to appeal the denial of his state post-conviction petition constituted nonexhaustion of state remedies. Petitioner sought to raise the exhaustion issue in his present petition for certiorari, but, as noted in text, we granted the writ limited to the search and seizure issue decided by the lower federal courts.

[4] At the outset of the federal habeas corpus proceeding now before us, both parties entered into the following stipulation, App., at 10:

"IT IS HEREBY STIPULATED by and between the parties through their respective counsel that, pursuant to the agreement of the parties in open court on February 16, 1968, both sides will rely exclusively on the record before the trial court in the original case of the State of Wyoming v. Harold Whiteley . . . and any and all parts of the record on appeal to the State of Wyoming . . . in the hearing on the merits of this case before the [U. S. District Court]."

with breaking and entering the building identified as the Rustic Bar. This complaint was made before a justice of the peace at approximately 11:30 A. M. on the 24th, and a warrant issued. After the investigation, the sheriff put out a state item on the radio to pick up two suspects of the breaking and entering, defendant and another. The message went to the network at Casper and was transmitted over the State, received by the Albany County Sheriff's Office and communicated to the Laramie Police Department, the message giving names and descriptions of the two persons and advising the type of car probably being driven and the amount of money taken, including certain old coins with the dates. Late at night on November 24, a Laramie patrolman, in reliance on the information in the radio item, arrested the defendant and his companion. At the time, the patrolman had no warrant for defendant's arrest nor search warrant. The officer together with a deputy sheriff, who had come up in the meantime, searched the car and removed a number of items introduced in evidence, including tools and old coins, identified at the trial as taken from Shively's Hardware. . . ."

Sheriff Ogburn's complaint, which provided the basis for the arrest warrant issued by the justice of the peace, is as follows:

> "I, C. W. Ogburn, do solemnly swear that on or about the 23 day of November, A. D. 1964, in the County of Carbon and State of Wyoming, the said Harold Whiteley and Jack Daley, defendants, did then and there unlawfully break and enter a locked and sealed building [describing the location and ownership of the building]." Appendix, at 28.

A state item 881, the bulletin which Sheriff Ogburn put out on the radio and which led to petitioner's arrest and search by the Laramie patrolman, is as follows:

> "P & H for B & E Saratoga, early A. M. 11–24–64. Subj #1. Jack Daley, WMA, 38, D. O. B. 2–29–[26], 5'10", 175, med. build, med. comp., blonde and blue. Tat. left shoulder: 'Love Me or Leave Me.' #2. Harold Whitley, WMA, 43, D. O. B. 6–22–21, 5' 11", 180, med. build, fair comp. brown eyes. Tat. on right arm 'Bird.' Poss. driving 1953 or 1954 Buick, light green bottom, dark top. Wyo. lic. 2-bal. unknown. Taken: $281.71 in small change, numerous old coins ranging from .5¢ pieces to silver dollars, dated from 1853 to 1908. Warrant issues, will extradite. Special attention Denver . . . ." Appendix, at 31.[5]

II

The decisions of this Court concerning Fourth Amendment probable cause requirements before a warrant for either arrest or search can issue require that the judicial officer issuing such a warrant be supplied with sufficient information to support an independent judgment that probable cause exists for the warrant.[6] *Spinelli* v. *United States*, 393 U. S. 410 (1969); *United States* v. *Ventresca*, 380 U. S. 102 (1965); *Aguilar* v. *Texas*, 378 U. S. 108 (1964); *Rugendorf* v. *United States*, 376 U. S. 528 (1964);

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[5] A second version of state item 881 is identical in all relevant respects except that it omits reference to the arrest warrant. See Appendix, at 37.

[6] In *Ker* v. *California*, 374 U. S. 23 (1963), the Court held that the same probable cause standards were applicable to federal and state warrants under the Fourth and Fourteenth Amendments. In *Mapp* v. *Ohio*, 367 U. S. 643 (1961), the Court held the exclusionary rule was applicable to state prosecutions.

Jones v. *United States*, 362 U. S. 257 (1960); *Giordenello* v. *United States*, 357 U. S. 480 (1958). In the instant case—so far as the record stipulated to by the parties reveals [7]—the sole support for the arrest warrant issued at Sheriff Ogburn's request was the complaint reproduced above.[8] That complaint consists of nothing more than the complainant's conclusion that the individuals named therein perpetrated the offense described in the complaint. The actual basis for Sheriff Ogburn's conclusion was an informer's tip, but that fact, as well as every other operative fact, is omitted from the complaint. Under the cases just cited, that document alone could not support the independent judgment of a disinterested magistrate.

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[7] See n. 4, *supra*.

[8] The dissent seems to imply that "this record shows" that Sheriff Ogburn received the description of the car contained in the radio bulletin from someone who also informed him that he also saw the car at the scene of the crime. The record wholly fails to support any such implication. Sheriff Ogburn, who testified on four separate occasions at the trial, see R. 105–112, 187–191, 310–314, 335–337, said nothing of the sort. Only one other witness, Leonard Russell Marion, testified to having given Ogburn any information about the car prior to Whiteley's arrest; Marion never testified to seeing the car near the scene of the crime. R. 317–322; 329–330. Indeed, it is quite apparent from reading Marion's testimony that his observations of Whiteley on the day of the robbery took place at his own house. R. 320–321.

More importantly, even the dissent apparently concedes that as far as the record in this case reveals, the only information Sheriff Ogburn communicated to the magistrate issuing the warrent was contained in his written complaint reproduced above. Under the cases of this Court, an otherwise insufficient affidavit cannot be rehabilitated by testimony concerning information possessed by the affiant when he sought the warrant but not disclosed to the issuing magistrate. See *Aguilar* v. *Texas*, 378 U. S. 108, 109 n. 1. A contrary rule would, of course, render the warrant requirements of the Fourth Amendment meaningless.

The State, however, contends that regardless of the sufficiency of the complaint to support the arrest warrant, the Laramie police officer who actually made the arrest possessed sufficient factual information to support a finding of probable cause for arrest without a warrant. In support of this proposition, the State argues that a reviewing court should employ less stringent standards for reviewing a police officer's assessment of probable cause as a prelude to a warrantless arrest than the court would employ in reviewing a magistrate's assessment as a prelude to issuing an arrest or search warrant.[9] That proposition has been consistently rejected by this Court. *United States* v. *Ventresca*, 380 U. S. 102, 105–109 (1965); *Aguilar* v. *Texas*, 378 U. S. 108, 110–111 (1964); *Jones* v. *United States*, 362 U. S. 257, 270–271 (1960). And the reason for its rejection is both fundamental and obvious: less stringent standards for reviewing the officer's discretion in effecting a warrantless arrest and search would discourage resort to the procedures for obtaining a warrant. Thus the standards applicable to the factual basis supporting the officer's probable cause assessment at the time of the challenged arrest and search are at least as stringent as the standards applied with respect to the magistrate's assessment. See *McCray* v. *Illinois*, 386 U. S. 300, 304–305 (1967).

Applying those standards to the instant case, the information possessed by the Laramie police officer at the time of arrest and search consisted of: (1) the data

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[9] "The legal principles relied upon by the State throughout this entire litigated process have been based on the premise that a law enforcement officer may make a warrantless arrest if he has the requisite probable cause, which can be something less than the requisite probable cause that must be presented to a judicial officer prior to the issuance of an arrest or search warrant." Brief for Respondent, at 6.

contained in state bulletin 881, reproduced, *supra;* (2) the knowledge, obtained by personal observation, that two men were driving a car matching the car described in the radio bulletin; (3) the knowledge, possessed by one of the arresting officers, that one of the people in the car was Jack Daley, Appendix, at 71; (4) the knowledge, acquired by personal observation, that the other individual in the car fitted the description of Whiteley contained in state bulletin 881, and (5) the knowledge, acquired by the officer after stopping Whiteley, that he had given a false name.[10]

This Court has held that where the initial impetus for an arrest is an informer's tip, information gathered by the arresting officers can be used to sustain a finding of probable cause for an arrest that could not adequately be supported by the tip alone. *Draper* v. *United States*, 358 U. S. 307 (1959). See *Spinelli* v. *United States*, 393 U. S. 410 (1969). But the additional information acquired by the arresting officers must in some sense be corroborative of the informer's tip that the arrestees committed the felony or, as in *Draper* itself, were in the process of committing the felony. See the opinions of the Court and that of MR. JUSTICE WHITE concurring in *Spinelli* v. *United States*, 393 U. S. 410 (1969). In the present case, the very most the additional information tended to establish is that either Sheriff Ogburn, or his informant, or both of them, knew Daley and Whiteley and the kind of car they drove; the record is devoid of any information at any stage of the proceeding from

[10] After arresting Whiteley and Daley, the officers searched the car and discovered in the car's interior the old coins taken in one of the burglaries and described in the radio bulletin. In addition, they found burglar's tools in the trunk of the car. Of course, the discoveries of an illegal search cannot be used to validate the probable cause judgment upon which the legality of the search depends.

the time of the robbery to the event of the arrest and search that would support either the reliability of the informant or the informant's conclusion that these men were connected with the crime. *Spinelli* v. *United States*, 393 U. S. 410 (1969); *McCray* v. *Illinois*, 386 U. S. 300 (1967); *Aguilar* v. *Texas*, 378 U. S. 108 (1964).

The State, however, offers one further argument in support of the legality of the arrest and search: the Laramie police relied on the radio bulletin in making the arrest, and not on Sheriff Ogburn's unnamed informant. Clearly, it is said, they had probable cause for believing that the passengers in the car were the men described in the bulletin, and, in acting on the bulletin, they reasonably assumed that whoever authorized the bulletin had probable cause to direct Whiteley's and Daley's arrest. To prevent arresting officers from acting on the assumption that fellow officers who call upon them to make an arrest have probable cause for believing the arrestees are perpetrators of a crime would, it is argued, unduly hamper law enforcement.

We do not of course question that the Laramie police were entitled to act on the strength of the radio bulletin. Certainly police officers called upon to aid other officers in executing arrest warrants are entitled to assume that the officers requesting aid offered the magistrate the information requisite to support an independent judicial assessment of probable cause. Where, however, the contrary turns out to be true, an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest.

In sum, the complaint on which the warrant issued here clearly could not support a finding of probable cause by the issuing magistrate. The arresting officer was not himself possessed of any factual data tending to cor-

roborate the informer's tip that Daley and Whiteley committed the crime.[11] Therefore, petitioner's arrest violated his constitutional rights under the Fourth and Fourteenth Amendments; the evidence secured as an incident thereto should have been excluded from his trial. *Mapp v. Ohio*, 367 U. S. 643 (1961).

III

There remains the question as to the proper disposition of this case. The State urges us to remand so that it will have an opportunity to develop a record which might show that the issuing magistrate had factual information additional to that presented in Sheriff Ogburn's complaint. Brief for Respondent, at 8–9. Yet the State concedes, as on the record it must, that at every stage in the proceedings below petitioner argued the insufficiency of the warrant as well as the lack of probable cause at the time of the arrest. Brief for Respondent, at 4. Knowing the basis for petitioner's constitutional claim, the State chose to try those proceedings on the record it had developed in the state courts. See n. 4, *supra*. Its sole explanation for this state of affairs is that "the state has felt, based on precedent and logic, that no court would accept the legal reasoning of petitioner." Brief for Respondent, at 9. In the circumstances of this case, that justification, as we have shown, is untenable.

Pursuant to our authority under 28 U. S. C. § 2106 to make such disposition of the case "as may be just

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[11] The arrest warrant issued at about noon on November 24, 1964. See Appendix, at 53. State bulletin 881 was broadcast at 3:03 p. m. that same day. App., at 31. It is apparent that Sheriff Ogburn did not himself acquire additional corroborative data possibly supporting a probable cause arrest after securing the warrant.

under the circumstances," we reverse the judgment of the Tenth Circuit and remand with directions that the writ is to issue unless the State makes appropriate arrangements to retry petitioner.[12] Cf. *Giordenello* v. *United States*, 357 U. S. 480, 487–488 (1958).

It is so ordered.

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[12] The State makes a halfhearted attempt to argue that the introduction of the illegally seized evidence was harmless error. The evidence, of course, was damning, to say the least. See n. 10, *supra*. The only other evidence implicating Whiteley was his accomplice's testimony. It is clear that the error cannot be said to be harmless under applicable standards. *Chapman* v. *California*, 386 U. S. 18 (1967); *Harrington* v. *California*, 395 U. S. 250 (1969).

Contrary to the implications in the dissenting opinion, see *post*, —, no witness at trial other than the accomplice placed Whiteley "near the scene of the crime" on the night of the robbery.

SUPREME COURT OF THE UNITED STATES

No. 136.—October Term, 1970

Harold Whiteley, Petitioner, *v.* Warden of Wyoming State Penitentiary.	On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

[March 29, 1971]

Mr. Justice Black, with whom The Chief Justice joins, dissenting.

With all respect to my Brethren who agree to the judgment and opinion of the Court, I am constrained to say that I believe the decision here is a gross and wholly indefensible miscarriage of justice. For this reason it may well be classified as one of those calculated to make many good people believe our Court actually enjoys frustrating justice by unnecessarily turning professional criminals loose to prey upon society with impunity. Here is what this record shows:

On the night of November 23, 1964, several establishments, including a bar and hardware store were broken into at the village of Saratoga, Wyoming. Some old coins and other items were taken from the hardware store. Some people saw petitioner and his companion that night in or near Saratoga. The next morning the sheriff, who lived at Rawlins, the county seat, another village in sparsely settled Carbon County,[1] investigated the burglaries. In addition to viewing the scene of the crimes, the sheriff received a rather detailed description of the car, including a portion of the license plate number, said to have been used by the burglars. The sheriff also received a tip that persuaded him that petitioner and his companion, Jack Daley, were probably guilty of the bur-

[1] The population of Carbon County according to the 1970 census is about 13,000 persons.

glary. Upon the strength of this tip, coupled with his observation of the scene of the crimes and the description of the vehicle, the sheriff personally appeared before the justice of the peace in Rawlins to secure a warrant for the arrest of petitioner and his companion. After securing the warrant he authorized and sent a statewide radio police alert describing the men and their car and calling upon officers to arrest them. The night of November 24, policemen at Laramie, Wyoming, learned that petitioner's companion, Daley, was in the city. They located and stopped the car described in the alert, finding it occupied by two men matching the descriptions contained in the message. One of the officers personally recognized Jack Daley. In response to a request for identification, Harold Whiteley gave police a false name. At that point the two men were arrested and the car was searched. Old coins, tools, and other items later identified at trial as having been taken from the burglarized hardware store were found in the trunk and interior of the car.

At the trial the seized items were introduced into evidence over petitioner's objection. In addition, petitioner was identified as having been near the scene of the crime on the night of November 23d.[2] Jack Daley, petitioner's companion, told the jury in vivid detail how he and Whiteley jimmied open the back door and bur-

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[2] Leonard Russell Marion testified at trial that he had seen Whiteley at his home in Saratoga, a town of about 1,000 population, on the day of the robbery. Mr. Marion further testified that he observed Whiteley's car and a portion of the license plate number and gave that information to the sheriff. See R. 248–252, 260–261. The majority fails to recognize that Saratoga is a very small country town and that strangers are most unlikely to move about unnoticed. Something obviously aroused Mr. Marion's suspicion or else he would not have reported the observation of petitioner and his car to the sheriff.

glarized the hardware store.[3] Petitioner took the stand and presented an alibi defense which was discredited by several witnesses including Jack Daley. Petitioner was convicted and sentenced to 10 years for burglary and concurrently for life imprisonment under Wyoming law because of his several prior convictions. It was charged and proved that he had been convicted of three felonies and the record shows that he was 43 year of age and had already served six times in the penitentiary. The Supreme Court of Wyoming affirmed the conviction September 15, 1966, *Whiteley* v. *State*, 418 P. 2d 164 (1966), holding that the Laramie officers had a right and duty to arrest the men in their vehicle because they had reasonable ground to believe the men had committed a burglary and that they had the fruits of their crime in the car, citing among other cases *Carroll* v. *United States*, 267 U. S. 132 (1925). See also *Chambers* v. *Maroney*, 399 U. S. 42 (1970).

I think it is a distortion of the Fourth Amendment's meaning to hold that this petitioner's arrest and the seizure of the goods he had stolen were an "unreasonable arrest" and an "unreasonable seizure." In deciding this question it should always be remembered that the Fourth Amendment itself does not expressly command that evidence obtained by its infraction should always be excluded from proof.

There was certainly probable cause to arrest this man. The store was burglarized. The county was a sparsely

[3] Daley's testimony was not uncorrobated. He testified in detail about the trip from Laramie to Saratoga where the crime was committed with stops in Medicine Bow and Elk Mountain. Ernest Hornden testified at trial that Daley and Whiteley were in the Dip Bar in Medicine Bow on the night of November 23, 1964, shortly before the robbery. Another witness, LeRoy Hansen, testified that Whiteley was in Elk Mountain on the day of the robbery, see R. 246–247.

settled one in which people know one another. Petitioner, whose previous life would appear to have earned for him the title of professional in the stealing vocation, was seen around the store with his car the very night of the burglary. Undoubtedly this longtime county sheriff (who appears still to be sheriff) was bound to know petitioner. The tip he received was so persuasive to him that in the performance of his official duty he was willing to assume all the risk incident to having petitioner arrested. It surely cannot be said that when a sheriff, with his prestige and standing, and bond against civil suit, communicates an emergency message to arrest men in cars as burglars, a policeman must stand supinely by while two people denounced as burglars go along their way. Of course these policemen had enough information from the sheriff to have probable cause to arrest petitioner.

My disagreement with the majority concerning the wisdom and constitutional necessity of a "little trial" before a magistrate or justice of the peace prior to the issuance of a search or arrest warrant is a matter of record. See *Aquilar* v. *Texas*, 378 U. S. 108, 116 (Clark, J., dissenting); *Spinelli* v. *United States*, 393 U. S. 410, 429 (BLACK, J., dissenting). But even accepting those decisions arguendo, they do not control the dispositon of this case which involves the apprehension of criminals in an automobile moving away from the scene of the crime less than 24 hours after its commission. The sheriff's belief that Whiteley and Daley were guilty, even if it was only a "suspicion" as the majority seems to label it, gave police officers proper grounds to stop petitioner's car and inquire about its passengers. *Terry* v. *Ohio*, 392 U. S. 1 (1968). And once the officers stopped the car and positively identified Jack Daley, they had every reason to believe that Whitely was lying and attempting to escape detection when he reported a false name. At least at

that point, if not before, the Laramie police had probable cause to arrest petitioner and Daley. With probable cause to arrest the men, they also had authority to search the car. Such a search could be justified under either of two theories. Even under *Chimel* v. *California*, 395 U. S. 752 (1969), the search of an automobile incident to the arrest of the occupants is permissible. And in this very case, the officers found a fully loaded handgun in the glove compartment. The search was also permissible under the "moveable vehicle" exception to the usual requirement for a search warrant. *Chambers* v. *Maroney*, 399 U. S. 42 (1970); *Carroll* v. *United States*, 267 U. S. 132 (1925). I consider it a travesty of justice to turn this man out of jail or give him a new trial six years after he was convicted.[4]

Fay v. *Noia*, 372 U. S. 391 (1963), does not, in my judgment, justify what the Court is doing. The trial court passed on this issue of validity of petitioner's arrest some years ago. Later he asked for relief through state post conviction procedures on the same ground and his claim was rejected. He has now sought relief through federal habeas corpus. After the United States District Court and the Court of Appeals rejected his unlawful search claim, bringing to 10 the number of state and federal judges who have consistently and unanimously rejected petitioner's claim, this Court reverses his judgment of conviction, although petitioner does not, of

[4] The search in this case took place on November 24, 1964. Although I disagreed with *Spinelli* v. *United States*, 393 U. S. 410 (1969), I have always believed that constitutional decisions should be fully retroactive in their application. See *Linkletter* v. *Walker*, 381 U. S. 618 (1965) (BLACK, J., dissenting). I am thus glad to see that the majority has apparently decided to apply constitutional decisions retroactively even when they do not affect the "integrity of the fact-finding process," see *id.*, at 639, and will greatly burden the administration of justice, see *Desist* v. *United States*, 394 U. S. 244, 250 (1969).

course, now allege his innocence. As I said in *United States* v. *Kaufman*, 394 U. S. 217, 231 (BLACK, J., dissenting), the *Fay* v. *Noia* remedy should be limited as it was by its own facts, and convictions should remain final unless a petitioner seeking habeas corpus alleges that he can currently show he was innocent. There is not even a suspicion here that this hardened criminal is innocent and I would let him stay in confinement to serve his sentence.

MR. JUSTICE BLACKMUN agrees with much that is said by MR. JUSTICE BLACK and also dissents from the opinion and judgment of the Court.